

2011

Process Preemption In Federal Siting Regimes

Ashira Ostrow
Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Ashira Ostrow, *Process Preemption In Federal Siting Regimes*, 48 Harv. J. on Legis. 289 (2011)
Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/607

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

ARTICLE

PROCESS PREEMPTION IN FEDERAL SITING REGIMES

ASHIRA PELMAN OSTROW*

Land use regulation has historically been a function of local governments. Congress left land use to the states; the states, in turn, empowered municipalities to enact zoning laws to guide planning and development decisions. Today, however, formal distinctions between state and federal spheres of power have been supplanted by an interjurisdictional understanding of federalism, in which local authority to regulate land overlaps with federal and state authority. Accordingly, Congress has experimented with a variety of policies aimed at compelling local governments to site nationally relevant facilities. Federal siting regimes have ranged from federal delegation of regulatory authority to the states, on one end of the spectrum, to unitary federal preemption of state control, vesting exclusive siting authority in a federal administrative agency, on the other.

This Article advances a more balanced approach to facilities siting termed "Process Preemption." In a Process Preemption regime, Congress imposes federal constraints on the siting process, but leaves primary decisionmaking power in the hands of local regulators. This Article argues that Process Preemption has the potential to further the effectiveness of federal land use policies because (a) its hybrid federal-local framework accounts for the interjurisdictional nature of a federal siting policy, effectively balancing national and local land use priorities, and (b) its emphasis on procedure increases the legitimacy, consistency, and ultimate public acceptance of controversial siting decisions.

I. INTRODUCTION

Historically, land use regulation has been considered a matter of local concern. The federal government left land use to the states; the states, in turn, empowered municipalities to enact zoning laws to guide planning and development decisions.¹ Today, however, formal distinctions between state and federal spheres of power have been supplanted by an interjurisdictional understanding of federalism, in which local authority to regulate land over-

* Associate Professor of Law, Hofstra Law School. B.A., University of Pennsylvania, 1999; J.D., Columbia Law School, 2003. This Article is the Winner of the 2011 American Association of Law Schools' Scholarly Paper Competition. The author is grateful for the thoughtful comments and suggestions of Bo Abrams, Nestor Davidson, Joshua Fershee, Joel Goldstein, Susan Lorde Martin, Adam Macleod, Ryan Ostrow, Adinah Pelman, David Rubenstein, Patty Salkin, Peter Salsich, Rose Villazor, Michael Wolf and especially, Erin Ryan, as well as to participants in the 2010 Southeast Association of Law Schools' New Scholars program and Hofstra Law School's Junior Faculty Forum and Summer Workshop Series. The author would also like to thank her outstanding research assistant, David L. Schwed, and her reference librarian at Hofstra Law School, Kevin Shelton, for their help with this project.

¹ Patricia Salkin & John R. Nolon, *Practically Grounded: Convergence of Land Use Law Pedagogy and Best Practices*, 60 J. LEGAL EDUC. 519, 523 (2011).

laps with federal and state authority.² Indeed, modern land use law involves a significant federal dimension,³ resulting in part from the enactment of a number of key federal statutes that have varying degrees of preemptive effect on local authority.⁴

This Article identifies an innovative framework for ordering federal-local interactions in land use law that was first articulated by Congress in the Telecommunications Act of 1996 ("TCA").⁵ This framework empowers local governments to make primary siting decisions, subject to federal constraints on the decisionmaking *process*. Because this hybrid approach imposes substantive and procedural constraints on the local land use process, this Article terms it "Process Preemption."⁶ By respecting the traditional division of powers in land use law, Process Preemption accounts for the interjurisdictional nature of federal policies that impact local land use.⁷ Moreover, in authorizing local implementation of a national program, Process Preemption encourages diversity within a federal framework and achieves a delicate and effective balance of federal and local interests in land use law.

In contrast, federal preemption regimes that place siting authority entirely within one level of government miss this interjurisdictional dynamic

² See, e.g., Robert R. M. Verchick & Nina Mendelson, *Preemption and Theories of Federalism*, in PREEMPTION CHOICE: THE THEORY, LAW, AND REALITY OF FEDERALISM'S CORE QUESTION 13, 14 (William W. Buzbee ed., 2009) [hereinafter PREEMPTION CHOICE] ("[T]he modern understanding of the Constitution's provisions leaves generous room for state and federal overlap."); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 225 (2000) ("The powers of the federal government and the powers of the states overlap enormously."); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005) (proposing modern theory of interactive, or polyphonic, federalism).

³ Federal constitutional authority to enact policies that impact land use stems from a number of enumerated powers, including the power to regulate interstate commerce, the taxing and spending power, and the Fourteenth Amendment. John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENVTL. L. REV. 821, 826–29 (2006).

⁴ Salkin & Nolon, *supra* note 1, at 523 (citing Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601–3631 (2006); Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (2006); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C. (2006)); Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-2000cc-5 (2006)).

⁵ See 47 U.S.C. § 332(c)(7) (2006).

⁶ Process Preemption is a form of conflict preemption by which state and local regulations that conflict with federal siting standards are preempted. See *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (defining conflict preemption and listing general categories of preemption); see also Verchick & Mendelson, *supra* note 2, at 21–22 (describing the forms of preemption, including express, conflict, obstacle, and field).

⁷ Interjurisdictional regulatory problems often arise when federal regulation of a national interest overlaps with the core local authority to regulate local land use or when the traditionally local police power obligation to protect local health and safety overlaps with the national interest in protecting national infrastructure and regulating interstate effects. Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 567–68, 573 (2007). This tension, which can generate regulatory gaps for interjurisdictional problems like urban sprawl and global warming, has been termed the "regulatory commons problem." See, e.g., William W. Buzbee, *Recognizing the Regulatory Commons: A Theory of Regulatory Gaps*, 89 IOWA L. REV. 1, 5 n.5 (2003).

and often fail to achieve federal land use goals. Aggressive federal preemption regimes that exclude local decisionmakers from the siting process falter because local opposition, in contrast to local authority, cannot be preempted.⁸

At the same time, federal siting regimes that permit states to exclusively empower local decisionmakers also fail to achieve federal goals. Particularly with regard to unpopular land use decisions, locally elected officials tend to focus on the well being of their own residents to the exclusion (and detriment) of outsiders.⁹ In the absence of countervailing federal or state policy, there is no mechanism through which to compel local decisionmakers to consider regional or federal interests in their decisionmaking process.¹⁰ Localities are therefore free to shape their communities, permitting those land uses deemed desirable and excluding others.

This Article develops a theory of Process Preemption through a comparison of federal statutes regulating the siting of nationally significant, but locally undesirable, facilities. In the 1980s, Congress adopted two diametrically opposed strategies for siting radioactive waste disposal facilities (collectively, the "Waste Siting Policies"). For high-level radioactive waste,¹¹ Congress adopted an aggressively preemptive approach, expressly designating federally owned property at Yucca Mountain, Nevada as the site for a single national high-level waste facility.¹² Though the site was chosen in 1988 and formally approved by Congress and the President in 2002, it was

⁸ Gail Bingham & Daniel S. Miller, *Prospects for Resolving Hazardous Waste Siting Disputes Through Negotiation*, 17 NAT. RESOURCES LAW. 473, 477 (1984); see also Richard C. Kearney, *Low-Level Radioactive Waste Management: Environmental Policy, Federalism, and New York*, 23 PUBLIUS: J. FEDERALISM 57, 63 (1993) (noting that unitary preemption of local authority invariably fails in the face of local opposition); Don Munton, *Introduction: The NIMBY Phenomenon and Approaches to Facility Siting*, in HAZARDOUS WASTE SITING AND DEMOCRATIC CHOICE 12 (Don Munton ed., 1996) (noting that preemption strategies are fatally flawed because preemption of local permitting authority does not strip local officials of political authority).

⁹ See, e.g., MICHAEL ALLAN WOLF, *THE ZONING OF AMERICA: EUCLID V. AMBLER* 138–43, 146–49 (2008) (describing local government parochialism regarding land use); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 453 (1990) (highlighting the exclusionary impact of local autonomy); Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1646 (2006) (describing the majoritarian nature of local government decisions regarding land use).

¹⁰ See *infra* notes 49–56.

¹¹ High-level radioactive wastes include spent reactor fuel and waste materials remaining after spent fuel is reprocessed. *High-Level Waste*, U.S. NUCLEAR REGULATORY COMM'N, <http://www.nrc.gov/waste/high-level-waste.html> (last updated July 13, 2010).

¹² Nuclear Waste Policy Amendments Act of 1987 ("NWPA"), 42 U.S.C. § 10172 (2006); see also Marta Adams, *Yucca Mountain—Nevada's Perspective*, 46 IDAHO L. REV. 423, 425–28 (2010) (describing history of NWPA). See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-48, *NUCLEAR WASTE MANAGEMENT: KEY ATTRIBUTES, CHALLENGES AND COSTS FOR THE YUCCA MOUNTAIN REPOSITORY AND TWO POTENTIAL ALTERNATIVES* (2009) [hereinafter GAO NUCLEAR WASTE].

met with continuous legal and political challenges and was ultimately abandoned in 2009.¹³

For low-level radioactive waste ("LLW"),¹⁴ Congress expressly empowered states to site disposal facilities, individually or through interstate compacts, with limited federal interference.¹⁵ Despite the fact that the states supported the Low Level Radioactive Waste Policy Act of 1980 and its 1985 Amendments (collectively, the "LLW Act"),¹⁶ the Act is widely regarded as a failure.¹⁷ In the decades since the LLW Act was passed, not one additional LLW disposal facility has been sited pursuant to the interstate compacts authorized by the Act despite numerous siting attempts.¹⁸

In contrast to the Waste Siting Policies, the TCA's siting policy ("Telecommunications Siting Policy")¹⁹ adopts a more balanced interjurisdictional

¹³ FY 2010 Appropriations Hearing Before the S. Comm. on Appropriations, 111th Cong. 10–11 (2009) [hereinafter *Appropriations Hearing*] (statement of Steven Chu, Secretary, U.S. Dep't of Energy); see also Josef H. Hebert, *Obama Team Says No Nuclear Waste at Yucca*, CHI. TRIB., Mar. 6, 2009, at C11; Bradford Plumer, *The Wasteland*, NEW REPUBLIC, Apr. 29, 2010, at 14.

¹⁴ Low-level waste includes items that have become contaminated with radioactive material, including protective shoe covers and clothing, wiping rags, equipment and tools, luminous dials, swabs, syringes, and laboratory animal carcasses. *Low Level Waste*, U.S. NUCLEAR REGULATORY COMM'N, <http://www.nrc.gov/waste/low-level-waste.html> (last updated Feb. 13, 2007).

¹⁵ For further discussion, see *infra* Part IV.A.2.

¹⁶ Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b–2021j (2006); Low-Level Radioactive Waste Policy Act of 1980, 42 U.S.C. §§ 2021b–2021d (2006). The National Governor's Association and the National Conference of State Legislatures endorsed regional sharing of low-level waste. Richard C. Kearney & Robert B. Garey, *American Federalism and the Management of Radioactive Wastes*, 42 PUB. ADMIN. REV. 14, 20 (1982).

¹⁷ See Michael B. Gerrard, *Fear and Loathing in the Siting of Hazardous and Radioactive Waste Facilities: A Comprehensive Approach to a Misperceived Crisis*, 68 TUL. L. REV. 1047, 1050 (1994) ("Few laws have failed so completely as the federal and state statutes designed to create new facilities for the disposal of hazardous and radioactive waste."); see also Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1, 50–51 (2010) (describing failure of the LLW Act); Gregory B. Jaczko, Comm'r, U.S. Nuclear Regulatory Comm'n, Remarks at the Electric Power Research Institute's 2007 International Low Level Waste Conference and Exhibit Show: The Need for Alternatives in Low Level Radioactive Waste Disposal (Jun. 26, 2007), available at <http://www.nrc.gov/reading-rm/doc-collections/commission/speeches/2007/S-07-033.html> ("I do not believe that the overarching objectives of the acts will ever be realized.").

¹⁸ See *Low-Level Waste Disposal: What We Regulate*, U.S. NUCLEAR REGULATORY COMM'N, <http://www.nrc.gov/waste/llw-disposal.html> (last updated Feb. 28, 2011) ("Most states have entered into compacts; however, no new disposal facilities have been built since the Act was passed."). Although no new facilities have been sited through the LLW Act, one privately owned, pre-existing facility in Clive, Utah was licensed to accept the least hazardous radioactive waste. M.R. Ledoux & M.S. Cade, *Licensing and Operations of the Clive, Utah Low-level Containerized Radioactive Waste Disposal Facility—A Continuation of Excellence* (paper presented at the Waste Management Conference, Feb. 22–24, 2002, Tucson, Ariz.), <http://www.wmsym.org/archives/2002/Proceedings/13/324.pdf>. See generally U.S. GEN. ACCOUNTING OFFICE, GAO-04-604, *LOW-LEVEL RADIOACTIVE WASTE: DISPOSAL AVAILABILITY ADEQUATE IN THE SHORT TERM, BUT OVERSIGHT NEEDED TO IDENTIFY ANY FUTURE SHORTFALLS* 20–21 (2004) [hereinafter *GAO Low-LEVEL WASTE*].

¹⁹ Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7) (2006).

approach that leaves primary siting authority in the hands of local regulators, but places explicit substantive and procedural constraints on the decision-making process. In effect, the Telecommunications Siting Policy preempts the siting *process*, without disempowering local governments.²⁰ Overall, the TCA's Process Preemption regime has succeeded in achieving its federal land use goals. Since the Act was passed, the number of cell towers sited across the country has increased dramatically, contributing to the development of a national telecommunications network.²¹ Moreover, the TCA's hybrid federal-local framework has encouraged local regulators to cooperate with land use developers.²²

Admittedly, it is difficult to draw generalized conclusions from a comparison of these siting regimes because radioactive waste disposal facilities are fundamentally different from cell phone towers. Indeed, this Article readily concedes that Process Preemption alone is not likely to overcome the entrenched local opposition to centralized radioactive waste disposal facilities.²³

Notwithstanding this limitation, this Article argues that the TCA's Process Preemption approach has two distinct advantages over the earlier Waste Siting Policies. First, Process Preemption's hybrid federal-local framework accounts for the interjurisdictional nature of a federal siting policy, effectively balancing national and local land use priorities. Second, by placing procedural constraints on the local decision-making process—including the requirement that decisions be made within a reasonable period of time, supported by substantial evidence contained in a written record, and subject to federal judicial review—Process Preemption increases the legitimacy, consistency, and public acceptance of controversial siting decisions.

The Article proceeds as follows. Part II explains why local governments have historically been empowered to regulate the use and development of land and analyzes the impact of federal preemption on local authority. Part III situates preemptive federal siting policies within the wider

²⁰ In particular, the Telecommunications Siting Policy contains both floor preemption provisions, which preempt local decisions that are inconsistent with or fail to meet the minimum federal procedural requirements, as well as ceiling preemption provisions, which preempt local decisions that are more restrictive than the federal standard. See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1553–54, 1573–75 (2007).

²¹ Since the passage of the act, the number of cell towers has increased from under 20,000 in 1995 to over 250,000 in 2010. *Wireless Quick Facts*, CTIA: THE WIRELESS ASSOCIATION, <http://www.ctia.org/advocacy/research/index.cfm/AID/10323> (last visited Mar. 5, 2011); see also *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte County/Kansas City*, 546 F.3d 1299, 1306 (10th Cir. 2008) (noting that the TCA has furthered federal telecommunications goals "by reducing the impediments that local governments could impose to defeat or delay the installation of wireless communications facilities such as cell phone towers, and by protecting against 'irrational or substanceless decisions by local authorities'").

²² John Copeland Nagle, *Cell Phone Towers as Visual Pollution*, 23 NOTRE DAME J.L. ETHICS & PUB. POL'Y 537, 564 (2009) (noting that the siting policy encourages cooperation between cellular companies and local communities).

²³ See *infra* Part V.C.

debate over federal preemption, highlighting the advantages of a national land use policy that leaves ample room for local tailoring and diversity. Part IV analyzes three federal siting regimes that run the gamut from complete preemption to complete delegation. On the basis of this analysis, Part V argues that Process Preemption, an interjurisdictional approach that utilizes a mix of federal and local regulatory actors, has the potential to aid policy-makers in addressing a variety of siting conflicts, including those currently arising in connection with the development of alternative and renewable energy sources.²⁴

II. OF FEDERAL LAW AND LOCAL LAND

Land use has long been considered the mainstay of local government power.²⁵ From its humble beginning as a way for urban municipalities to prevent overcrowding and segregate incompatible uses, to its current concern with aesthetics and “smart growth,”²⁶ zoning is the primary method through which local communities regulate development and express community preferences and character. Local officials, both part of and accountable to the local community, are generally thought to be in the best position to respond to community land use preferences. As the New Jersey Supreme Court noted in an early zoning case, “local officials who are thoroughly familiar with their community’s characteristics and interests and are the proper representatives of its people are undoubtedly the best equipped to pass initially on [zoning requests].”²⁷

This Part explores the relationship between federal preemption and local land use law. Section A explains why land use regulation has historically been delegated to local governments. Section B analyzes the way in which federal preemption of local land use laws impacts the local planning and zoning process.

²⁴ Despite national support, alternative and renewable energy projects often face intense opposition at the local level. Sara C. Bronin, *Curbing Energy Sprawl with Microgrids*, 43 CONN. L. REV. 547, 571–72 (2011) (describing local opposition to renewable and alternative energy projects, including wind and solar installations); Christopher M. Crane, *State Authority in Siting of Liquefied Natural Gas Import Terminals*, 14 BUFF. ENVTL. L.J. 1, 5–8 (2006) (describing public opposition to liquefied natural gas (“LNG”) siting); see also *infra* Part V.C.

²⁵ Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 784 n.48 (1992) (describing land use as “the most important local regulatory power”); GARY D. TAYLOR & MARK A. WYCKOFF, *Intergovernmental Zoning Conflicts over Public Facilities Siting: A Model Framework for Standard State Acts*, 41 URB. LAW. 653, 659–60 (2009) (finding continuing local primacy in land use regulation).

²⁶ Smart Growth is an urban planning and transportation theory that promotes compact development. See generally STUART MECK, *GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE* (2002), available at <http://www.planning.org/growingsmart/guidebook/print/index.htm>; Patricia E. Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381 *passim* (2002) (describing smart growth policies at the federal, state, and local levels of government).

²⁷ Ward v. Scott, 105 A.2d 851, 855 (N.J. 1954).

A. Why Local Governments Regulate Land Use

Federal preemption of property rights stands in direct contrast to a long history of empowering local governments to regulate land use.²⁸ From its inception, zoning has provided a means for local communities to address urban problems and coordinate growth.²⁹ Early land use ordinances were limited in scope, focusing on fire prevention and building standards,³⁰ or on restricting noxious uses from residential neighborhoods.³¹ By the end of the 19th century, however, municipalities became increasingly concerned about the general compatibility of land uses within their borders.³² By separating residential districts from commercial and industrial areas, early city planners hoped to stabilize neighborhoods and protect property values.³³

In 1916, New York City adopted a widely publicized comprehensive zoning ordinance, prompting then-Secretary of Commerce Herbert Hoover to establish a committee to study zoning.³⁴ In 1922, the zoning committee promulgated the Standard State Zone Enabling Act ("SZE")³⁵ to aid states in authorizing municipalities to adopt zoning ordinances. In the landmark 1926 case of *Village of Euclid v. Ambler Realty Co.*,³⁶ the Supreme Court

²⁸ See William W. Buzbee, *Urban Sprawl, Federalism, and the Problem Of Institutional Complexity*, 68 *FORDHAM L. REV.* 57, 97 (1999) (noting that "land use decisions have remained quintessentially within the province of local governments"); William Fischel, *The Evolution of Zoning since the 1980s: The Persistence of Localism* § 3 (Dartmouth Coll.—Dep't of Econ., Working Paper, 2010), available at <http://ssrn.com/abstract=1686009> (describing persistence of localism in zoning despite federalization of other formerly local functions). See generally 1 PATRICIA E. SALKIN, *AM. LAW ZONING* § 3:1 (5th ed. 2008).

²⁹ See Shelby D. Green, *The Search for A National Land Use Policy: For the Cities' Sake*, 26 *FORDHAM URB. L.J.* 69, 81–82 (1998) (noting that cities were the first to systematically consider developing urban infrastructure); Ashira Pelman Ostrow, *Judicial Review of Local Land Use Decisions: Lessons from RLUIPA*, 31 *HARV. J.L. & PUB. POL'Y* 717, 734–37 (2008) (describing rise of zoning in response to urban conditions).

³⁰ See, e.g., ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 75 (3rd ed. 2005); Charles L. Siemon, *The Paradox of "In Accordance with a Comprehensive Plan" and Post Hoc Rationalization: The Need for Efficient and Effective Judicial Review of Land Use Regulations*, 16 *STETSON L. REV.* 603, 607 (1987) (noting that prior to the Civil War, "local land use controls were limited in focus and generally related to fire and building standards"). But see John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 *HARV. L. REV.* 1252, 1289–93 (1996) (documenting extensive land regulation during the colonial period).

³¹ See, e.g., *In re Hang Kie*, 10 P. 327 (Cal. 1886) (ordinance restricting operation of laundries); *Shea v. City of Muncie*, 46 N.E. 138 (Ind. 1897) (ordinance restricting operation of taverns and liquor stores); *Cronin v. People*, 82 N.Y. 318 (1880) (ordinance restricting operation of slaughterhouses).

³² Ostrow, *supra* note 29, at 734–37.

³³ *Id.* at 728 & n.43 (citing J. Gregory Richards, *Zoning for Direct Social Control*, 1982 *DUKE L.J.* 761, 762).

³⁴ WOLF, *supra* note 9, at 26–31 (describing rise of zoning and role of New York's ordinance); Richard H. Chused, *Euclid's Historical Imagery*, 51 *CASE W. RES. L. REV.* 597, 598 (2001).

³⁵ ADVISORY COMM. ON ZONING, U.S. DEP'T OF COMMERCE, *A STANDARD STATE ZONING ENABLING ACT* (rev. ed. 1926).

³⁶ 272 U.S. 365 (1926).

upheld the validity of zoning as a valid exercise of the police power.³⁷ Recognizing the need to coordinate development in rapidly changing urban communities, the Court stated:

Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable.³⁸

With the Supreme Court's approval, the practice of zoning spread rapidly. By 1930, thirty-five states had passed enabling acts authorizing localities to zone.³⁹

That local governments were primarily empowered to regulate land is not a historical accident. Rather, local primacy in this area of law stems from a practical recognition that local governments are institutionally better suited to this task than are higher levels of government.⁴⁰ Local and county governments are often the only levels of government that have the capacity to discover and act on the preferences of local constituencies.⁴¹ The federal government lacks the detailed knowledge necessary for local land use planning and cannot possibly bear the aggregate cost of administering local land use policies.⁴² As the Ohio Supreme Court observed in upholding a local zoning ordinance, "it is better to leave the formulation and implementation of zoning policy to the city council, or other legislative body, which has not

³⁷ *Id.* at 389. The Court expressly noted that "the village, though physically a suburb of Cleveland, is politically a separate municipality, with powers of its own and authority to govern itself as it sees fit within the limits of the organic law of its creation and the State and Federal Constitutions." *Id.*

³⁸ *Id.* at 386-87.

³⁹ ELLICKSON & BEEN, *supra* note 30, at 76; WOLF, *supra* note 9, at 121-34.

⁴⁰ Buzbee, *supra* note 28, at 94; *see also* Nolon, *supra* note 3, at 853 (listing reasons for local control over land use including its long-standing history, variation in local economic markets and environments, capacity of local citizens and politicians to respond to local conditions, and ability to implement federal and state initiatives).

⁴¹ Buzbee, *supra* note 28, at 92; Marci A. Hamilton, *Federalism and the Public Good: The True Story Behind the Religious Land Use and Institutionalized Persons Act*, 78 IND. L.J. 311, 335 (2003) (noting that by "keeping land use law local, citizens have more direct access to their representative . . . and a proportionally larger voice in the land use process that directly affects them").

⁴² *See* John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1218 (1995) (arguing that only local governments have the detailed local knowledge and resources necessary to administer programs implicating land use); Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1699-1700 (2001) (same).

only the expertise and staff, but also, the constitutional responsibility to police this area effectively.”⁴³

Moreover, land, by its nature, is inherently local. It exists within definite metes and bounds and cannot be moved. As a result, its uses often have a greater impact on those living nearby than on those living far away.⁴⁴ For example, a decision to site a telecommunications tower or hazardous waste facility in one community has a significantly greater impact on the aesthetics, property values, health and safety, and character of the sited community than on other communities.⁴⁵ Similarly, collective decisions regarding the permissible uses of land, such as whether to permit a church in a commercial district or whether to permit homes to be painted pink, are an essential part of how communities develop their character and pursue common goals.⁴⁶ Thus, local officials, who are a part of the community and are accountable to it, are often in the best position to guide the use and development of land.

B. How Federal Preemption Alters Local Land Use

Federal preemption of local land use regulation has two direct and interrelated effects on local governments. First, federal preemption of land use regulations compels local authorities to consider national interests in their decision-making process. Second, federal preemption subsidizes the land use promoted under the federal scheme by reducing (or eliminating) the costs associated with obtaining local land use permits. To illustrate, the federal Fair Housing Act (“FHA”)⁴⁷ has been interpreted to require local governments to modify their zoning codes to accommodate group homes for handicapped individuals.⁴⁸ The Fair Housing Act thus (1) compels local governments to consider the federal interest in assuring adequate housing for

⁴³ *Leslie v. City of Toledo*, 423 N.E.2d 123, 125 (Ohio 1981); *see also Oak Park Trust & Sav. Bank v. City of Chicago*, 438 N.E.2d 630, 635 (Ill. App. Ct. 1982) (“It is within the province of the local municipal body to determine the uses of property and establish zoning classifications.”).

⁴⁴ Dwyer, *supra* note 42, at 1218 (describing intense conflict over land use at local level because burdens of use are felt most directly by those living near the land); Hamilton, *supra* note 41, at 335 (noting that land use decisions are primarily local because they have a greater impact on those living near the land); *cf.* Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 828–32 (2009) (emphasizing the psychological attachments to land that develop in connection with the local activities conducted on the land).

⁴⁵ Indeed, some studies have demonstrated a correlation between declining property values and the proximity of the home to a waste disposal facility. *See* Gerrard, *supra* note 17, at 1109–10.

⁴⁶ Hamilton, *supra* note 41, at 335.

⁴⁷ Fair Housing Act of 1968, 42 U.S.C. §§ 3601–3619 (2006).

⁴⁸ *See, e.g., Oxford House, Inc. v. Twp. of Cherry Hill*, 799 F. Supp. 450, 458 (D.N.J. 1992) (granting alcoholics’ and drug addicts’ request for an injunction against the town’s zoning ordinance prohibiting them from occupying a group house); *Ass’n of Relatives and Friends of AIDS Patients (A.F.A.P.S.) v. Regulations and Permits Admin. or Administracion de Reglamentos y Permisos (A.R.P.E.)*, 740 F. Supp. 95 (D.P.R. 1990) (enjoining the municipality from refusing to issue a special use permit for the operation of a hospice for terminally-ill AIDS patients).

handicapped persons and (2) creates a subsidy for handicapped persons by eliminating, or reducing, the need for such persons to obtain zoning related permits. In enacting a statute that constrains local zoning discretion, Congress, in effect, determines that the protected land use is deserving of a subsidy and that the national interest in the protected land use should be weighed against the local interest in regulating development.

1. *Mandating Local Consideration of Extra-Local Concerns*

Critics of local land use have long worried about local governments' tendency to focus exclusively on the well-being of its own residents, often to the detriment of outsiders. Modern scholars have expressed concern that local regulatory decisions in a variety of substantive areas "have external effects on neighboring communities, shaping regional economies without any imperative that the extraterritorial consequences of local decision-making be taken into account."⁴⁹ Reliance on local government to regulate land use has been blamed for a variety of social problems, including urban sprawl, environmental injustice, racial segregation, lack of affordable housing, and conflicting land uses at municipal borders.⁵⁰ Indeed, the capacity for local decision-makers to respond to community preferences, often touted as a democratic benefit of local land use regulation, creates a double-edged sword: in many contexts, community preferences conflict with broader regional and national needs.⁵¹ For example, a community might resist siting a low-income housing development or sewer treatment plant despite a recognized regional need.

Local resistance to unpopular developments is a well-known phenomenon, commonly shorthand as "NIMBY," an acronym for Not In My Backyard.⁵² NIMBYs object to further development within their communities, fearing that such development might reduce the market value of their

⁴⁹ Nestor M. Davidson, *Cooperative Localism: Federal-Local Cooperation in an Era of State Sovereignty*, 93 VA. L. REV. 959, 1024 (2007); see also Herbert Wechsler, *Foreword to MODEL LAND DEV. CODE X* (Am. Law Inst. 1976) (noting that the SZEAL, "when it is applied by local governments within a region, tends to disregard the greater interests of the regional community and in many instances fails to recognize and protect valid local needs").

⁵⁰ Craig Anthony (Tony) Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVT'L. L. 441, 442-43 (2007); see also Wolf, *supra* note 9, at 147-48 (noting that zoning law insulates "local, self-interested efforts" to exclude beneficial facilities from legal challenge).

⁵¹ Jerold S. Kayden, *National Land-Use Planning in America: Something Whose Time Has Never Come*, 3 WASH. U. J.L. & POL'Y 445, 449-50 (2000) (describing primacy of local regulation even when such regulation conflicts with regional needs).

⁵² See William A. Fischel, *Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's "Privatizing the Neighborhood"*, 7 GEO. MASON L. REV. 881, 884-85 (1999) (providing economic explanation for NIMBYism); Munton, *supra* note 8, at 2-3 (describing roots of NIMBYism); Ashira Pelman Ostrow, *Minority Interests, Majority Politics: A Comment on Richard Collins' "Telluride's Tale of Eminent Domain, Home Rule, and Retroactivity"*, 86 DENV. U. L. REV. 1459, 1467-68 (2009) (illustrating the impact of NIMBYism in preventing arguably beneficial facilities from being constructed outside of Telluride).

homes or change the character of the community.⁵³ NIMBYism presents a challenge to social and political programs that require local government co-operation. According to William Fischel:

NIMBYs show up at the zoning and planning board reviews, to which almost all developers of more-than-minor subdivisions must submit. If NIMBYs fail to reduce the scale and density of the project at these reviews, they often deploy alternative regulatory rationales, such as environmental impact statements, historic districts, aboriginal burial sites, agricultural preservation, wetlands, flood plains, access for the disabled and protection of (often unidentified) endangered species at other local, state and federal government forums, including courts of law And if NIMBYs fail in these efforts, they seek, often by direct democratic initiatives, to have the local zoning and planning regulations changed to make sure that similar developments do not happen again.⁵⁴

NIMBYism results from the local political market's failure to account for the external impacts of local zoning decisions.⁵⁵ Though a region may desperately need additional low-income housing, the individuals who would benefit from such housing are largely absent from the local jurisdiction and unable to participate in the decisionmaking process. Traditional land use law provides no mechanism through which to force local governments to consider these external or underrepresented interests.⁵⁶ According to Thomas Merrill:

NIMBY presents a classic prisoners dilemma. Everyone has an incentive to export the costs of an activity (such as a locally undesirable land use), but if everyone pursues this strategy, the benefits of the activity are lost to all. Federal regulation that permits weighing the costs and benefits of the activity in question as part of an overall strategy seems to be a logical response.⁵⁷

⁵³ Patricia E. Salkin & Ashira Pelman Ostrow, *Cooperative Federalism and Wind: A New Framework for Achieving Sustainability*, 37 HOFSTRA L. REV. 1049, 1052 (2009); see also Serkin, *supra* note 9, at 1656 (arguing that NIMBYs are motivated both by a desire to protect property values and by a desire to preserve community character).

⁵⁴ Fischel, *supra* note 52, at 881–82.

⁵⁵ *Id.* at 891; see also Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 6 (1992) (noting that the difficulty in siting locally undesirable land uses ("LULUs") represents a higher level of market failure than the typical land use case); John R. Nolon, *Champions of Change: Reinventing Democracy Through Land Law Reform*, 30 HARV. ENVTL. L. REV. 1, 16 (2006) ("[A]t the local level, a certain dysfunction sets in because land use decision makers are elected, or are appointed by elected officials. As a result, those who live next to proposed developments . . . have influence and power because they are constituents of the decision-makers and they resist change.").

⁵⁶ See Davidson, *supra* note 49, at 1024; Mandelker & Tarlock, *supra* note 55, at 6 (noting that existing land use control mechanisms are inadequate to deal with LULU siting).

⁵⁷ Thomas W. Merrill, *Preemption in Environmental Law: Formalism, Federalism Theory, and Default Rules*, in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 166,

To that end, federal regulation that preempts or constrains the siting process creates the legal mechanism necessary to compel local governments to weigh national interests against local concerns in siting decisions.⁵⁸

2. Federal Subsidization of Protected Land Use

Federal preemption that eliminates or reduces the ability of local authorities to bargain over zoning restrictions provides a significant political and economic benefit to the land use developer, thereby subsidizing the protected land use.⁵⁹ In many localities, land use developers must negotiate with the local community to secure homeowner approval.⁶⁰ Federal preemption of local zoning requirements dramatically alters the dynamic between community and developer:

Removing a zoning restriction from a piece of land ordinarily provides a financial benefit to the property owner. Every developer knows that securing the consent of local officials to a project with hostile neighbors is an arduous, expensive process that often requires community compensation, reductions in project size, and changes in design.⁶¹

In addition, where federal preemption serves to override concerns regarding facilities siting, it forces the local community to absorb the “psychic costs” of the land use.⁶² In other words, if developers do not internalize the negative externalities of siting undesirable land uses, then the neighbors are, in effect, subsidizing the use.⁶³ Since federal preemption provides a significant subsidy for the targeted land use and interferes with a deeply local function, the decision to preempt and the degree of preemption must be carefully considered. The next Part provides context for this consideration by situating federal preemption of local land use authority within the broader preemption debate.

175–76 (Richard A. Epstein & Michael S. Greve eds., 2007); see also Robert L. Glicksman & Richard E. Leyy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 Nw. U. L. REV. 579, 608 (2008) (arguing that ceiling preemption is a proper response to NIMBYism).

⁵⁸ See *infra* notes 100–103 (describing the use of federal regulation in the environmental context to force state and local actors to internalize the costs of their decisions).

⁵⁹ See Gerrard, *supra* note 17, at 1108; Serkin, *supra* note 9, at 1652.

⁶⁰ Serkin, *supra* note 9, at 1652 (“Whether through bribes or extortion—exactions or threats to leave—special interest groups must still secure local homeowner approval or they will not find a responsive local government.”).

⁶¹ Gerrard, *supra* note 17, at 1108.

⁶² Robert A. Bohrer, *Fear and Trembling in the Twentieth Century: Technological Risk, Uncertainty and Emotional Distress*, 1984 Wis. L. REV. 83, 111 (1984) (noting that denial of damages for emotional distress related to facilities siting represents a deliberate choice to subsidize the facility rather than require the developer to internalize the “psychic costs” of the facility).

⁶³ Gerrard, *supra* note 17, at 1109 (describing economic subsidy in the context of hazardous waste facilities siting).

III. PERSPECTIVES ON PREEMPTION IN LAND USE

So long as it is regulating within the scope of its constitutionally enumerated powers, Congress has broad authority under the Supremacy Clause to preempt state and local laws.⁶⁴ In a number of substantive areas, Congress has emphatically asserted its authority to enact uniform national policies and regulations. For example, federal civil rights statutes prohibit discrimination in employment and housing and broadly preempt less protective state and local laws.⁶⁵ The Fair Labor Standards Act⁶⁶ establishes a national minimum wage, preempting state laws that set a lower minimum wage or that have no minimum wage at all.⁶⁷ Similarly, the Employee Retirement Income Security Act ("ERISA")⁶⁸ establishes national standards for most pension and health plans in private industry and entirely preempts similar state laws.⁶⁹

As the Supreme Court's federalism opinions emphasize, however, there are a number of compelling normative reasons for Congress to wield its preemptive power cautiously. In the words of the Court, federalism:

assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.⁷⁰

Thus, the underlying policy choice in preemption involves weighing the advantages of uniformity against the benefits of decentralization.⁷¹ In many substantive areas, Congress seeks to split the difference, adopting what have

⁶⁴ *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203 (1983) ("It is well established that within constitutional limits Congress may pre-empt state authority by so stating in express terms.").

⁶⁵ *See, e.g.*, Employment Non-Discrimination Act, 42 U.S.C. § 2000e-2 (2006); Fair Housing Act, 42 U.S.C. § 3604 (2006); Americans with Disabilities Act, 42 U.S.C. § 12101 (2006).

⁶⁶ 29 U.S.C. §§ 201–219 (2006).

⁶⁷ *See id.* § 206 (2006 & Supp. I 2007).

⁶⁸ *Id.* §§ 1001–1461 (2006).

⁶⁹ *See id.*; cf. Eleanor D. Kinney, *Clearing the Way for an Effective Federal-State Partnership in Health Reform*, 32 U. MICH. J.L. REFORM 899, 935–36 (1999) (criticizing the broad preemptive scope of ERISA, and suggesting it be replaced with a more flexible framework that allows for state experimentation).

⁷⁰ *Gregory v. Ashcroft*, 501 U.S. 452, 458–59 (1991) (internal citation omitted); *see also* Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 6 (2010) (noting that federalism "promotes choice, competition, participation, experimentation and the diffusion of power"); Ryan, *supra* note 7, at 601–02 (identifying values underlying a federal system of government).

⁷¹ Davidson, *supra* note 49, at 1006–07 & n.206; Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 856 (1998).

been variously termed “interactive,”⁷² “dynamic,”⁷³ “iterative,”⁷⁴ “diagonal,”⁷⁵ or most generically, “cooperative”⁷⁶ regimes that engage multiple, overlapping levels of government to promote diversity within a federalist framework.⁷⁷

Typically, cooperative federalist statutes outline the contours of a regulatory program, encouraging states to implement the program in accordance with federal guidelines.⁷⁸ Such programs involve varying combinations of preemption, collaboration, and fiscal incentives to involve state governments in the regulatory process.⁷⁹ For example, cooperative federalist statutes often include both carrots and sticks: the promise of federal financial assistance for states that comply, and the threat of more intrusive federal preemption should states fail to do so.⁸⁰ Within the cooperative federalist framework, states are authorized to experiment with implementation techniques and tailor their individual programs to accommodate local conditions and preferences.⁸¹ Cooperative federalism thus seeks a functional compromise between federal preemption and federal delegation, preserving the primacy of the fed-

⁷² E.g., Schapiro, *supra* note 2; William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145, 146 (2007) (noting that Congress and agencies prefer regulatory overlap and interaction, “harnessing the strengths of state and federal institutional actors and forcing the two to interact”).

⁷³ E.g., Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159 *passim* (2006).

⁷⁴ Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U.L. REV. 1097 *passim* (2009).

⁷⁵ Hari M. Osofsky, *Is Climate Change “International”? Litigation's Diagonal Regulatory Role*, 49 VA. J. INT'L L. 585, 642 (2009).

⁷⁶ Weiser, *supra* note 42, at 1696; Dwyer, *supra* note 42, at 1197–99; Davidson, *supra* note 49, at 967–68.

⁷⁷ Davidson, *supra* note 49, at 967–68 (noting that cooperative federalism balances uniformity and diversity); Weiser, *supra* note 42, at 1695 (noting that in enacting cooperative federalism regimes “Congress opts for the benefits of diversity in regulatory policy within a federal framework”).

⁷⁸ See, e.g., Endangered Species Act of 1973, 16 U.S.C. § 1531(c)(2) (2006); Clean Water Act, 33 U.S.C. § 1251(b) (2006); Clean Air Act, 42 U.S.C. § 7402(a) (2006); see also Jonathan H. Adler, *Judicial Federalism and the Future of Environmental Regulation*, 90 IOWA L. REV. 377, 384–87 & n.35 (2005) (discussing cooperative federalism schemes); Dwyer, *supra* note 42, at 1197–99 (describing cooperative federalism under the Clean Air Act); Weiser, *supra* note 42, at 1698 (describing cooperative federalism programs that permit state variances from minimum federal standards or encourage state discretion in implementation).

⁷⁹ Adler, *supra* note 78, at 384 (describing use of financial assistance to induce states to participate in cooperative schemes); Davidson, *supra* note 49, at 966–67 & n.15 (describing range of federal-state regulatory options, including preemption, collaboration, and absence of federal involvement).

⁸⁰ As Professor Adler explains:

State programs that meet federal standards are typically eligible for federal financial assistance. States that fail to adopt adequate programs are not only denied the relevant federal funding, they can also be subject to various sanctions and federal preemption of their programs. That is, if states refuse to regulate in accordance with federal guidelines, the federal government may regulate in their place.

Adler, *supra* note 78, at 384.

⁸¹ *Id.*; Weiser, *supra* note 42, 1697–98 & n.23 (noting that federal programs promote diversity in order to allow states to tailor federal policies to local conditions).

eral government to set national priorities and standards without sacrificing the benefits of diversity achieved through decentralization.⁸²

A. *The Benefits of Decentralization in Land Use Law*

Decentralization allows states to tailor regulatory responses to accommodate varying geographic and economic conditions and community preferences.⁸³ The ability to tailor regulation to local conditions is vitally important for land use because the substantive content of “good” land use law varies by locale:

[T]he legal framework of rules, policies, and incentives to influence “good” land use practices is informed by the geographical context of the physical and socioeconomic systems in which land use operates. In other words, the effectiveness and validity of legal measures to control harmful externalities depend upon [an] understanding of the geographical context in which such effects arise.⁸⁴

Thus, the “reasonableness” of a particular zoning decision depends upon the desired city form and social make up of the area.⁸⁵ Given the tremendous diversity between, and even within local jurisdictions, federal preemption that creates uniform land use standards may result in policies that fit poorly with local conditions.⁸⁶

In addition, citizen participation in policymaking, which is presumably easier at the state and local levels,⁸⁷ facilitates local tailoring by increasing governmental responsiveness to the needs and preferences of the local community. In other words, “the smaller the polity in geography and in population, the easier it is for the people (1) to monitor what their government is doing, (2) to criticize or praise, and therefore (3) to affect public policy.”⁸⁸

⁸² Davidson, *supra* note 49, at 967–68.

⁸³ *Id.* at 1006–07; see also Benjamin K. Sovacool, *The Best of Both Worlds: Environmental Federalism and the Need for Federal Action on Renewable Energy and Climate Change*, 27 STAN. ENVTL. L. J. 397, 432 (2008).

⁸⁴ RUTHERFORD H. PLATT, *LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY* 419 (rev. ed. 2004) (emphasis removed).

⁸⁵ Mandelker & Tarlock, *supra* note 55, at 10 (further noting that there are no “transcendent zoning values” that apply to all land use decisions).

⁸⁶ Karol Ceplo & Bruce Yandle, *Western States and Environmental Federalism: An Examination of Institutional Viability*, in ENVIRONMENTAL FEDERALISM 225, 225–26 (Terry L. Anderson & Peter J. Hill eds., 1997) (“There is recognition that homogenous solutions applied to heterogeneous problems often yield high costs and weak results.”); Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 136–37 (2005) (“The failure to take into account local environmental conditions—let alone local tastes, preferences, and economic conditions—leads to ‘one size fits all’ policies that fit few areas well, if at all.”).

⁸⁷ See Davidson, *supra* note 49, at 1008; Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1069 (1980) (noting that limited size is required for individual participation in political life).

⁸⁸ Hamilton, *supra* note 41, at 321.

In contrast, both Congress, which enacts preemption statutes, and the federal courts, which interpret such statutes, “are remote from average citizens and lack effective, low-cost channels through which citizens can communicate and implement their views.”⁸⁹

Moreover, novel state and local environmental and land use laws often serve as a catalyst for further government action, encouraging regulation in areas that otherwise would not be addressed.⁹⁰ For example, California famously adopted standards governing automobile emissions, leading to the adoption of a federal vehicles emissions standard.⁹¹ New York similarly has been credited with initiating a states-wide trend in offering tax incentives for environmentally conscious “green building.”⁹² More recently, state and local initiatives in the area of climate change have prompted the federal government to consider federal climate change regulations,⁹³ as well as a national renewable portfolio standard.⁹⁴

⁸⁹ S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 695 (1991).

⁹⁰ See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, 19–22 (2007) (describing key role of state and local politicians as “natural policy entrepreneurs who can significantly influence what sorts of conditions are publicly recognized as problems”); Kirsten Engel, *State and Local Climate Change Initiatives: What Is Motivating State and Local Governments to Address a Global Problem and What Does This Say About Federalism and Environmental Law?*, 38 URB. LAW. 1015, 1026 (2006) (noting that “[e]nvironmental law is replete with examples where state regulatory initiatives on a given issue have succeeded in prompting a federal regulatory response.”).

⁹¹ Jonathan H. Adler, *The Fable of Federal Environmental Regulation: Reconsidering the Federal Role in Environmental Protection*, 55 CASE W. RES. L. REV. 93, 102–03 (2004); Ryan, *supra* note 7, at 617.

⁹² Darren A. Prum, *Creating State Incentives for Commercial Green Buildings: Did the Nevada Experience Set an Example or Alter the Approach of Other Jurisdictions?*, 34 WM. & MARY ENVTL. L. & POL’Y REV. 171, 190 (2009) (“Many people credit New York with pioneering the use of government incentives to entice developers into sustainable buildings.”); *Green Buildings*, N.Y. DEPT OF ENVTL. CONSERVATION, <http://www.dec.ny.gov/energy/218.html> (last visited Mar. 22, 2011) (noting that New York’s innovative tax incentive program has become a model for other states and communities); see also Andrew Meyerson, *The Dollars and Cents of Green Construction*, J. ACCOUNTANCY, May 2005, at 47, 50 (appending a chart of the thirty-five states that offer a combination of income, corporate, property, or sales tax incentives to green building projects).

⁹³ See Matthew L. Wald, *E.P.A. Moving on Greenhouse Gases*, N.Y. TIMES, Dec. 24, 2010, at A16 (describing EPA’s proposed regulation of greenhouse gas emissions despite opposition in Congress); J. Kevin Healy & Jeffrey M. Tapick, *Climate Change: It’s Not Just a Policy Issue for Corporate Counsel—It’s a Legal Problem*, 29 COLUM. J. ENVTL. L. 89, 98–100 (2004) (noting state initiatives on climate change include urging the federal government to address the issue); cf. Engel, *supra* note 90, at 1026 (noting that “the long-term significance of state and local action on climate change may lie in its impact in triggering action at higher levels of government, such as at the national level or even within the international arena”).

⁹⁴ Renewable Portfolio Standards (“RPS”) have been adopted in many states to require public utilities to generate increasing percentages of electricity from renewable sources. Bronin, *supra* note 24, at 577; see also Lincoln L. Davies, *Power Forward: The Argument for a National RPS*, 42 CONN. L. REV. 1339, 1341 (2010) (noting that over twenty-five proposals for a national RPS have been introduced in the federal legislature); Salkin & Ostrow, *supra* note 53, at 1050–51 (describing proposed federal renewable portfolio standard).

Decentralization thus enables states to serve as “laboratories of democracy.”⁹⁵ In contrast, federal preemption prevents states from experimenting with novel social and economic strategies.⁹⁶ Moreover, preemptive federal standards can lock in suboptimal regulatory choices by eliminating the incentives and ability of sub-national actors to seek change. Along these lines, William Buzbee has argued:

With complete displacement, especially if common law venues are preempted, no actor or institution outside the federal regulatory venue has any room or incentive to criticize and seek change. Change will likely occur only if the preempting federal actor—be it an administrative agency or the legislature—decides to change its previous decision.⁹⁷

Instead, better regulatory policy may be achieved if local regulators are given the flexibility and discretion to experiment with a variety of standards before a single national standard is selected.⁹⁸

B. The Benefits of National Uniformity in Land Use Law

Despite the many benefits of decentralization, for some land use problems, national uniformity through preemptive federal statutes is desirable. As Steven G. Calabresi observes, “[s]ometimes variety is not the spice of life; as to some items it may be a downright nuisance and an expensive one at that. National government eliminates these potential deadweight social costs with general gains in social utility as a result.”⁹⁹

For example, a federal approach might be necessary to address a problem that crosses state boundaries. The most commonly cited example is environmental regulation, where, the argument goes, individual states have little incentive to consider the effects of their environmental policies on other states:

Consider a factory that dumps pollution in a rural Illinois river, making the river downstream, next to a populous Missouri town,

⁹⁵ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting); see also Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Government*, 58 EMORY L.J. 1333, 1339 (2009) (assessing the extent to which local governments experiment with social and legal policy).

⁹⁶ Buzbee, *supra* note 72, *passim* (using experimentalist scholarship to illuminate the risk of an aggressive approach to preemption). See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

⁹⁷ Buzbee, *supra* note 72, at 157.

⁹⁸ Weiser, *supra* note 42, at 1702; cf. Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 545 (2003) (describing, as a possible objection to agency rulemaking, that it “requires agencies to set achievable levels of compliance based on speculation when they more fruitfully might experiment with proposed levels”).

⁹⁹ Steven G. Calabresi, *“A Government of Limited and Enumerated Powers”: In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 780 (1995).

unswimmable and undrinkable. The upstream state government may not have a strong incentive to take into account the harm to downstream out-of-state residents—a “negative externality” from an in-state activity that generates jobs and tax revenues.¹⁰⁰

Some argue that addressing environmental spillovers in a decentralized system is virtually impossible.¹⁰¹ In cases of substantial interstate spillovers, only the federal government is able to compel states to absorb the costs of their activities.¹⁰² Along these lines, Thomas Merrill has argued that state laws should be presumptively preempted when a state is attempting to export a disproportionate share of the cost of environmental regulation to other states.¹⁰³

Similarly, the federal government, which is removed from local politics and NIMBY sentiment, may be in the best position to distribute the burdens of certain locally undesirable land uses across the nation. In his seminal work on hazardous waste facilities siting, Michael Gerrard emphasized the potential for the federal government to fairly allocate the burdens of waste disposal amongst the fifty states based upon the amount of waste they generate, their existing disposal capacity, and their geographic characteristics.¹⁰⁴

In contrast, state governments, perhaps because they are more responsive to local constituents, are less likely to adopt aggressive redistributive programs.¹⁰⁵ Further devolving power to local governments seems to exacerbate the effect. As Richard Briffault has noted, “[c]ontemporary cities, as a rule, do not engage in innovative redistributive programs, not because they lack the legal authority, but rather because they fear that initiating such programs would cause residential and commercial taxpayers to depart.”¹⁰⁶ Thus,

¹⁰⁰ Verchick & Mendelson, *supra* note 2, at 18; see also Glicksman & Levy, *supra* note 57, at 593 (arguing that federal environmental regulation is most justified when collective action problems create incentives for states acting individually to regulate in ways that are contrary to the interests of the states as a collective).

¹⁰¹ See, e.g., Christina C. Caplan, *The Failure of Current Legal and Regulatory Mechanisms to Control Interstate Ozone Transport: The Need for New National Legislation*, 28 *ECOLOGICAL L.Q.* 169, 201–02 (2001) (arguing that decentralization cannot address interstate spillovers); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 *MICH. L. REV.* 570, 624 (1996) (“[W]hen problems are transboundary in scope . . . decentralized enforcement breaks down entirely.”).

¹⁰² See Kirsten H. Engel, *State Environmental Standard-Setting: Is There a “Race” and Is It “To the Bottom”?*, 48 *HASTINGS L.J.* 271 (1997) (arguing that without federal regulation, states would engage in a “race to the bottom” by relaxing environmental standards to attract industry, contrary to the national interest); Richard J. Pierce, Jr., *Regulation, Deregulation, Federalism, and Administrative Law: Agency Power to Preempt State Regulation*, 46 *U. PITT. L. REV.* 607, 670 (1985) (arguing that states should not be permitted to make regulatory decisions that create substantial interstate spillovers).

¹⁰³ Merrill, *supra* note 57, at 175.

¹⁰⁴ Gerrard, *supra* note 17, at 1205–06.

¹⁰⁵ See Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 *COLUM. L. REV.* 552, 594–95 (1999) (observing that the national government has historically been far more interventionist on behalf of both the poor and racial minorities than have state governments).

¹⁰⁶ Briffault, *supra* note 9, at 408; see also Cashin, *supra* note 105, at 594–95.

the federal government is often in the best position to make fundamental policy choices about redistribution.¹⁰⁷

In addition, where a national market truly exists, the presence of state regulations that differ substantially from federal requirements and from each other hinders interstate commerce and the growth of the regulated industry.¹⁰⁸ Uniformity helps industry and investors by providing a more “consistent and predictable statutory environment.”¹⁰⁹ In fact, federal preemption statutes are often enacted in response to industry lobbying seeking to displace an array of inconsistent regulatory requirements with a uniform federal standard.¹¹⁰

In the land use context, local permitting processes create an array of inconsistent regulations that can impede the growth of national industries. Consider, for example, the Telecommunications Siting Policy, explored in greater detail in Part IV. In its report on the telecommunications law, the House Commerce Committee explained that diverse state and local siting requirements hindered the development of a national telecommunications network.¹¹¹ According to the report:

[C]urrent State and local requirements, siting and zoning decisions by non-federal units of government, have created an inconsistent and, at times, conflicting patchwork of requirements which will inhibit the deployment of Personal Communications Services (PCS) . . . The Committee believes it is in the national interest that uniform, consistent requirements, with adequate safeguards of the public health and safety, be established as soon as possible.¹¹²

The Telecommunications Siting Policy was thus established to increase regulatory consistency and predictability for telecommunications service providers so as to facilitate the growth of a national telecommunications network.

¹⁰⁷ Cashin, *supra* note 105, at 556 (noting that “voters show more willingness to accept redistributive spending at the national level”); *see also* PAUL E. PETERSON, *CITY LIMITS* 82–83 (1981) (supporting federal involvement in redistributive programs to improve equity).

¹⁰⁸ Ann E. Carlson, *Energy Efficiency and Federalism*, 107 MICH. L. REV. FIRST IMPRESSIONS 63, 67 (2008) (noting that “[e]ven proponents of a strong state role in environmental policymaking advocate federal preemption for the regulation of products for which there is a national market, such as appliances”); Weiser, *supra* note 42, at 1710–11 (highlighting the benefits of uniformity where a national market exists, as in the case of e-signatures).

¹⁰⁹ Esty, *supra* note 101, at 619; *see also* Sovacool, *supra* note 83, at 421–22.

¹¹⁰ Engel, *supra* note 73, at 184–85; *see also* Hills, *supra* note 90, at 29–30 (noting that industry interest groups will often favor regulatory uniformity even when that uniformity results in more stringent controls); Hoke, *supra* note 89, at 691–92 & n.27 (describing industry preference for federal preemption); Pietro S. Nivola, *Does Federalism Have a Future?*, 142 PUB. INT., Winter 2001, at 44, 55 (noting that the federal motor-vehicle safety and emissions standards were enacted after “[t]he automobile industry lobbied to preempt the states from setting disparate standards, some of which might be overly militant.”).

¹¹¹ H.R. REP. NO. 104-204, pt. 1, at 94 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 61.

¹¹² *Id.*

IV. FEDERAL SITING REGIMES

Notwithstanding the historically local nature of land use law, the federal government has long played a role in shaping local development.¹¹³ Since the 1970s the federal government has been the primary regulator of environmental issues, with a significant impact on local land use policies.¹¹⁴ In addition, federal housing acts have long required local communities to engage in some form of land use planning as a condition to the receipt of federal housing and community development funds.¹¹⁵ Federal funding for urban housing and renewal programs has directly influenced the growth and development of urban areas.¹¹⁶ Federal transportation policies have facilitated suburbanization (and urban sprawl),¹¹⁷ while the federal mortgage interest deduction and property tax deductions for owner-occupied housing impacts local housing patterns and development.¹¹⁸ Federal agricultural policies promote land conservation by local authorities,¹¹⁹ and in many regions of the country, local land use policies are impacted by federal land holdings.¹²⁰ In the civil rights context, federal laws including the Americans with

¹¹³ See, e.g., Green, *supra* note 29, at 70–71; Robert I. McMurtry, *Using Federal Laws and Regulations to Control Local Land Use*, A.L.I.-A.B.A. LAND USE INST. 357 (2001); Salkin, *supra* note 26, at 383–87.

¹¹⁴ See, e.g., Coastal Zone Management Act, 16 U.S.C. §§ 1451–1464 (2006) (providing funds, policy guidance, and technical assistance to coastal state governments to help them establish and maintain coastal zone management programs that meet federal standards); Clean Water Act, 33 U.S.C. § 1251(b) (2006) (establishing national pollution standards and permitting requirements); *Rapanos v. United States*, 547 U.S. 715, 721–23 (2006) (discussing the federal wetland permitting process for local development).

¹¹⁵ Peter Salsich, Jr., *Toward A Policy Of Heterogeneity: Overcoming A Long History Of Socioeconomic Segregation In Housing*, 42 WAKE FOREST L. REV. 459, 487 (2007).

¹¹⁶ Scott L. Cummings & Benjamin S. Beach, *The Federal Role in Community Economic Development*, 40 CLEARINGHOUSE REV. 89, 91–92 (2006); Green, *supra* note 29, at 88–98; see also Michael S. Barr, *Credit Where It Counts: The Community Reinvestment Act and Its Critics*, 80 N.Y.U. L. REV. 513, 560–96 (2005) (discussing the impact of current federal attempts to increase economic investment in low- and middle-income communities).

¹¹⁷ Davidson, *supra* note 49, at 968 n.21; Green, *supra* note 29, at 81–84; U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-99-87, COMMUNITY DEVELOPMENT: EXTENT OF FEDERAL INFLUENCE ON “URBAN SPRAWL” IS UNCLEAR 2–4 (1999) (recognizing the federal role in patterns of local development).

¹¹⁸ See Davidson, *supra* note 49, at 968 n.21; Green, *supra* note 29, at 84–87.

¹¹⁹ See, e.g., Sodbuster Law, 16 U.S.C. § 3811 (2006) (requiring the implementation of conservation plans for certain land); Conservation Reserve Program, 16 U.S.C. §§ 590a, 3831 (1994) (authorizing contracts with eligible owners and operators of highly erodible cropland to assist in conserving and improving their soil and water resources); see also Green, *supra* note 29, at 99–102 (describing impact of federal agricultural policies on local land use).

¹²⁰ See, e.g., Sandra K. Davis, *Fighting over Public Lands: Interest Groups, States, and the Federal Government*, in WESTERN PUBLIC LANDS AND ENVIRONMENTAL POLITICS 11, 25 (Charles Davis ed., 1997) (discussing conflicts between county governments and federal agencies over public land policy); Robert D. Comer, *Cooperative Conservation: The Federalism Underpinnings to Public Involvement in the Management of Public Lands*, 75 U. COLO. L. REV. 1133, 1133 (2004) (discussing efforts to include local entities in federal land management decisions).

Disabilities Act ("ADA")¹²¹ and the Fair Housing Act establish baseline standards of equality that constrain local zoning authority.¹²²

This Part examines several federal regulatory regimes aimed at siting nationally relevant facilities.¹²³ Section A analyzes the federal approach to siting radioactive waste disposal facilities. Federal siting regimes have run the gamut from aggressive unitary preemption, in the case of high-level waste, to complete delegation to state authority, in the case of low-level waste. Both regimes, however, have dramatically failed to achieve national land use goals.

Section B examines the "Process Preemption" siting regime established by the Telecommunications Siting Policy. The Telecommunications Siting Policy leaves primary siting authority in the hands of local regulators, but places explicit substantive and procedural constraints on the decision-making process.¹²⁴ Though litigation continues regarding the interpretation of the Act,¹²⁵ the Telecommunications Siting Policy has succeeded in facilitating cell phone tower siting, enabling the rapid deployment of a national telecommunications network.¹²⁶

¹²¹ 42 U.S.C. §§ 12101–12213 (2006).

¹²² See, e.g., *Oconomowoc Residential Programs, Inc. v. Milwaukee*, 300 F.3d 775, 781–83 (7th Cir. 2002) (requiring municipality to grant zoning variance to accommodate group homes for the disabled); *Innovative Health Sys., Inc. v. White Plains*, 117 F.3d 37, 44 (2d Cir. 1997) (concluding that the ADA prohibits municipalities from discriminating against individuals on the basis of their disability when enacting and implementing zoning ordinances); see also *supra* notes 47–48.

¹²³ Another federal siting regime not explored in this Article is that established by the siting provisions of the Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (codified at 42 U.S.C.S. §§ 15801-16524 (2006) and scattered sections of 15 U.S.C. and 16 U.S.C. (2006)), which grants the Federal Energy Regulatory Commission exclusive siting authority for liquid natural gas terminals and some electric transmission corridors, 15 U.S.C. § 717b (2006). See, e.g., Joshua P. Fershee, *Misguided Energy: Why Recent Legislative, Regulatory, and Market Initiatives are Insufficient to Improve the U.S. Energy Infrastructure*, 44 HARV. J. ON LEGIS. 327 (2007) (discussing the effects of the Energy Policy Act of 2005).

¹²⁴ The Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc to 2000cc-5 (2006) ("RLUIPA"), which requires courts to strictly scrutinize local land use decisions that substantially burden religious exercise, is arguably another, more blunt, example of Process Preemption. However, RLUIPA is a civil rights statute whose purpose differs significantly from the regulatory regimes analyzed in this Article. Thus, a full analysis of RLUIPA through the framework of Process Preemption will be saved for the future. For an overview of RLUIPA, see generally Adam J. Macleod, *A Non-Fatal Collision: Interpreting RLUIPA Where Religious Land Uses and Community Interests Meet*, 42 URB. LAW. 41 (2010); Ostrow, *supra* note 29.

¹²⁵ See Robert B. Foster, *What the Meaning of "May" May Be: Recent Developments in Judicial Review of Land Use Regulation of Cellular Telecommunications Facilities Under the Telecommunications Act of 1996*, 41 URB. LAW. 501, 503–12 (2009) (summarizing recent litigation over the Telecommunications Siting Policy); Susan Lorde Martin, *Wind Farms and NIMBYs: Generating Conflict, Reducing Litigation*, 20 FORDHAM ENVTL. L. REV. 427, 433–35 (2010) (describing ongoing litigation).

¹²⁶ See *supra* notes 21–22.

A. *Preemption and Delegation in Radioactive Waste Facilities Siting*

During the 1950s and 1960s, waste disposal facilities were sited in the same way as other forms of heavy industry. Companies considered a variety of factors, including proximity to markets and materials; availability of labor, transportation, utilities and infrastructure; and land and development costs.¹²⁷ With little governmental oversight and little concern for environmental or geological factors, disposal facilities tended to be built close to industrial operations, often in or near cities, or else on wetlands and floodplains, where land was less expensive.¹²⁸

In the 1970s, however, increased public awareness of the health and safety risks posed by radioactive waste led to intense public opposition to the siting of disposal facilities.¹²⁹ In response, the federal government adopted two diametrically opposed strategies for siting radioactive waste facilities: complete preemption of state and local control for siting high-level waste facilities, and complete delegation to the states for siting low-level waste facilities. Despite their differences, both approaches have failed to overcome local opposition to these land uses.

1. *Unitary Preemption and High-Level Radioactive Waste*

For national security reasons, the federal government has long asserted exclusive authority to manage high-level radioactive waste.¹³⁰ The Atomic Energy Act of 1954¹³¹ and the Energy Reorganization Act of 1974¹³² granted the Nuclear Regulatory Commission ("NRC") exclusive regulatory authority over high-level nuclear waste facilities.¹³³ The statutes left no room for state participation, other than in an advisory capacity for certain transportation issues.¹³⁴ Nonetheless, by the late 1970s, the states began to actively regulate, restrict, and even ban the shipment of highly toxic nuclear waste and the establishment of radioactive waste facilities within their borders.¹³⁵

To resolve the jurisdictional conflict, Congress enacted the Nuclear Waste Policy Act of 1982 ("NWPA").¹³⁶ The Act was intended to "establish a schedule for the siting, construction, and operation of repositories" to protect the public and the environment "from the hazards posed by high-level

¹²⁷ Gerrard, *supra* note 17, at 1091.

¹²⁸ *Id.*

¹²⁹ *Id.* at 1138.

¹³⁰ *Id.* at 1165–66 ("For obvious reasons of national security, federal primacy in the disposal of radioactive waste is well established.").

¹³¹ 42 U.S.C. §§ 2011–2297h-13 (2006).

¹³² 42 U.S.C. §§ 5801–5891 (2006).

¹³³ 42 U.S.C. § 2011; 42 U.S.C. § 5801; *see also* Kearney, *supra* note 8, at 59 (noting that the Atomic Energy Act of 1954 organized federal-state relations in a hierarchical "layer-cake" model, in which the federal government regulated all phases of the nuclear fuel cycle).

¹³⁴ Kearney & Garey, *supra* note 16, at 18.

¹³⁵ *Id.*

¹³⁶ 42 U.S.C. §§ 10101–10270 (2006).

radioactive waste.”¹³⁷ The NWPA required the Secretary of Energy to nominate five sites for a high-level radioactive waste repository and to recommend three of them to the President for further study by January 1, 1985.¹³⁸ The Act further required the Secretary of Energy to develop guidelines by which to evaluate potential repository sites.¹³⁹

The NWPA also allowed any designated state to veto its selection, subject to an override by a majority vote of both houses of Congress.¹⁴⁰ Not surprisingly, little progress was made in selecting a site, as each Department of Energy (“DOE”) proposal was strenuously opposed by state and local officials.¹⁴¹ In 1987, Congress amended the NWPA and expressly designated Yucca Mountain, federally owned land in Nevada, as the single national disposal site for all high-level radioactive waste.¹⁴² Though Congress formally approved the location in 2002, the opening of the site was continuously delayed by public opposition, legal challenges, and environmental studies.¹⁴³

In 2009, more than two decades after the NWPA was enacted and billions of dollars spent studying and constructing the facility, the DOE announced that the Yucca Mountain site was no longer a viable option for storing high-level waste.¹⁴⁴ In early 2010, the DOE formally initiated a termination action by filing a motion with the NRC seeking to withdraw its Yucca Mountain license application.¹⁴⁵ In response, South Carolina, concerned that it would become a primary target for a new high-level radioactive waste site, filed suit to enjoin the DOE from abandoning the Yucca Mountain site.¹⁴⁶ A panel of administrative law judges at the NRC ruled that the NWPA prevents the DOE from terminating its license application.¹⁴⁷

¹³⁷ *Id.* § 10131(b).

¹³⁸ *Id.* § 10132(b).

¹³⁹ *Id.* § 10132(a).

¹⁴⁰ *Id.* § 10135(c).

¹⁴¹ Kearney, *supra* note 8, at 59 (noting that “political gridlock quickly ensued as vehemently opposed state officials and citizens rejected various DOE proposals”).

¹⁴² 42 U.S.C. § 10101; Kearney, *supra* note 8, at 60.

¹⁴³ Adams, *supra* note 12, at 432, 438 (describing delays caused by scientific and environmental studies and judicial and administrative challenges); Kearney, *supra* note 8, at 60 (describing contentious siting process at Yucca Mountain).

¹⁴⁴ See *supra* note 13; see also Motion to Withdraw of U.S. Dept. of Energy at 1 & n.2, U.S. Dep’t of Energy (High-Level Waste Repository), No. 63-001, 2010 NRC LEXIS 14 (Mar. 3, 2010), available at http://www.energy.gov/news/documents/DOE_Motion_to_Withdraw.pdf (noting that the DOE’s decision to terminate the Yucca Mountain project was announced in its 2011 budget request); Editorial, *Nuclear Wasteland: The U.S. Still Needs a Long-Term Solution*, WASH. POST, June 14, 2010, at A16 (describing termination of Yucca Mountain project).

¹⁴⁵ Motion to Withdraw of U.S. Dep’t of Energy, *supra* note 144, at 1.

¹⁴⁶ Brief of Petitioner-Appellant, South Carolina v. U.S. Dep’t of Energy, No. 10-1229, 2010 WL 978771, at *6 (4th Cir. Feb. 26, 2010) (South Carolina complains that “[t]he abandonment of the Yucca Mountain site would place South Carolina back on the list of candidate states for a high-level nuclear waste or spent fuel storage or disposal facility of some kind.”).

¹⁴⁷ Matthew L. Wald, *Administration Cannot Drop Bid for Nuclear Waste Dump in Nevada, Panel Finds*, N.Y. TIMES, June 30, 2010, at A19. The NWPA requires the NRC to complete its review of the DOE application in three years. See GAO NUCLEAR WASTE, *supra* note 12, at 7.

In the meantime, nuclear waste continues to be stored where it is generated, at over eighty commercial and DOE nuclear facilities located in thirty-five states.¹⁴⁸ Facility managers must actively manage the nuclear waste by continually isolating, confining, and monitoring it to keep humans and the environment safe.¹⁴⁹

In conjunction with the termination of Yucca Mountain, President Obama established a Blue Ribbon Commission on America's Nuclear Future that is charged with conducting a comprehensive review of policies for managing the disposal of high-level waste.¹⁵⁰ Despite the ongoing work of the Blue Ribbon Commission, the United States is no closer to siting a high-level radioactive waste repository than it was before the NWPA was enacted over twenty years ago. Yet the need for a viable solution is even more pressing now as the DOE's renewed interest in nuclear power as an alternative to fossil fuel¹⁵¹ and the ongoing nuclear crisis in Japan¹⁵² promise to thrust the siting of nuclear facilities into the national spotlight once again.

2. State Autonomy and Low-Level Radioactive Waste

In contrast to Congress's preemptive approach to high-level waste siting, Congress expressly delegated siting authority for low-level waste disposal facilities to the states. The LLW Act of 1980 and the 1985 Amendments represented a significant break from the prior scheme, in which the federal government asserted exclusive authority over radioactive waste management.¹⁵³ The new policy was hailed for devolving power to the states, freeing the national government from the day-to-day responsibility of LLW management, and granting states the power to exercise their constitutional authority over land use regulation and the protection of public health and safety.¹⁵⁴

¹⁴⁸ GAO NUCLEAR WASTE, *supra* note 12, at 1.

¹⁴⁹ *Id.* at 8.

¹⁵⁰ DEP'T OF ENERGY, BLUE RIBBON COMM'N ON AMERICA'S NUCLEAR FUTURE, ADVISORY COMMITTEE CHARTER (Mar. 1, 2010), available at http://www.energy.gov/news/documents/BRC_Charter.pdf; Motion to Withdraw of U.S. Dep't of Energy, *supra* note 144, at 1–2 (terminating Yucca Mountain project and confirming establishment of Blue Ribbon Commission).

¹⁵¹ Matthew L. Wald, *A Comeback for Nuclear Power? After a 30 Year Hiatus, Nuclear Energy in the U.S. May Be Getting Another Chance*, N.Y. TIMES UPFRONT, May 10, 2010, at 14 (describing the Obama administration's interest in promoting the development of "a new generation of safe, clean nuclear power plants"). *But cf.* Bob Herbert, Op-Ed, *We're Not Ready*, N.Y. TIMES, July 20, 2010, at A23 (cautioning against development of nuclear power).

¹⁵² On March 11, 2011, Japan suffered a devastating earthquake and tsunami, triggering a nuclear crisis at the Fukushima Daiichi nuclear power plant. *See, e.g.,* William J. Broad & David Jolly, *U.N.'s Nuclear Chief Says Japan Is 'Far From the End of the Accident'*, N.Y. TIMES, Mar. 27, 2011, at A14; Eric Lichtblau, *Lobbyists' Long Effort to Revive Nuclear Industry Faces New Test*, N.Y. TIMES, Mar. 25, 2011, at A1; Hiroko Tabuchi & Ken Belson, *Contaminated Water Leaks Are Reported at Nuclear Plant*, N.Y. TIMES, Mar. 29, 2011, at A12.

¹⁵³ Richard C. Kearney & John J. Stucker, *Interstate Compacts and the Management of Low-Level Radioactive Wastes*, 45 PUB. ADMIN. REV. 210, 216–18 (1985).

¹⁵⁴ *Id.* at 210.

Despite this early optimism, the LLW policy has also failed in its goal of siting additional LLW disposal facilities.

a. The National Low-Level Waste Disposal Crisis

Between 1962 and 1971, six commercial low-level radioactive waste facilities were opened in the United States with little public awareness or opposition.¹⁵⁵ Between 1975 and 1978, three of these sites were permanently closed, either because they were full or due to environmental contamination.¹⁵⁶ As the public became increasingly aware of the health and environmental risks posed by hazardous waste facilities, public opposition to facilities' siting grew.¹⁵⁷ As a result, local communities began relying on the land use regulatory process to prevent the siting of such undesirable land uses.¹⁵⁸

In 1979, two of the remaining three LLW facilities—Richland, Washington and Beatty, Nevada—were forced to shut down temporarily in response to reports of improper handling of LLW.¹⁵⁹ The closures left Barnwell, South Carolina as the only operating LLW facility in the country.¹⁶⁰ The governor of South Carolina, fearing that his state would have to take on the entire nation's low-level radioactive waste, ordered a fifty percent reduction in the quantity of waste accepted at the Barnwell site.¹⁶¹ Feeling similarly overburdened, the governors of Washington and Nevada soon threatened to shut their sites permanently.¹⁶²

The governors of all three host states testified before Congress, proposing a national LLW policy that would require states to manage the disposal of their own waste and encourage states to form interstate compacts to fulfill their responsibilities.¹⁶³ The governors' view, later endorsed by the National

¹⁵⁵ *New York v. United States*, 505 U.S. 144, 150 (1994) (listing sites at Beatty, Nevada (1962), Maxey Flats, Kentucky (1963), West Valley, New York (1963), Hanford, Washington (1965), Sheffield, Illinois (1967), and Barnwell, South Carolina (1971)); see also Daniel Tarlock, *Benjamin Davy's Essential Injustice: A Comparative and Philosophical Analysis of the LULU Siting Mess*, 22 HARV. ENVTL. L. REV. 607, 612 (1998) ("Until the 1980s, the location of a hazardous waste or nuclear facility was simply another exercise of local land use authority; host communities paid little attention to the issue, and even welcomed power plants and dumps.").

¹⁵⁶ *New York*, 505 U.S. at 150; Barry G. Rabe et al., *NIMBY and Maybe: Conflict and Cooperation in the Siting of Low Level Radioactive Waste Disposal Facilities in the United States and Canada*, 24 ENVTL. L. 68, 75 (1994) (describing closure of Maxey Flats and West Valley disposal sites due to leaking radioactive materials).

¹⁵⁷ Gerrard, *supra* note 17, at 1052; Rabe et al., *supra* note 156, at 76; Tarlock, *supra* note 155, at 610–14 (describing the rise of local opposition to facilities siting).

¹⁵⁸ Deborah M. Mostaghel, *The Low-Level Radioactive Waste Policy Amendments Act: An Overview*, 43 DEPAUL L. REV. 379, 382–85 (1994); Tarlock, *supra* note 155, at 612.

¹⁵⁹ *New York*, 505 U.S. at 150.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*; Kearney, *supra* note 8, at 60 (noting that "the governors of the three remaining LLW host states met in 1979 and agreed that the burden had become onerous").

¹⁶³ Kearney, *supra* note 8, at 60.

Governors' Association ("NGA"),¹⁶⁴ treated LLW disposal as a land use issue, traditionally within the scope of state and local authority, rather than a national security issue, properly within the purview of the federal government.¹⁶⁵

Congress adopted these suggestions in the LLW Act, which declared a federal policy of holding each state responsible for disposing of its own LLW and authorized states to enter into regional waste disposal compacts.¹⁶⁶ The LLW Act required each compact region to develop a siting plan containing "detailed procedures and a schedule for establishing a facility location and preparing a facility license application."¹⁶⁷ Under the Act, the sited states would be authorized to refuse to accept waste generated outside of their regional compacts beginning in 1986.¹⁶⁸ At the time, the state-based approach "received bipartisan support in Congress and among the nation's governors, and was hailed as a unique example of congressional responsiveness to the desires of the states."¹⁶⁹ Commentators believed that the LLW Act would succeed because the states, now exclusively responsible for siting the facilities, had strongly supported the legislation.¹⁷⁰

b. Incentives for Compliance: Carrots and Sticks

Despite their support for the legislation, states remained reluctant to site waste facilities within their own borders.¹⁷¹ Moreover, the LLW Act did not impose penalties on states that failed to comply with the plan.¹⁷² As a result, little progress was made in siting additional LLW facilities.¹⁷³ In 1985, Con-

¹⁶⁴ *New York*, 505 U.S. at 190–91; Rabe et al., *supra* note 156, at 78.

¹⁶⁵ Kearney, *supra* note 8, at 60; *see also* Mostaghel, *supra* note 158, at 385 (noting that all states wanted to be able to choose disposal sites, rather than have them imposed by the federal government).

¹⁶⁶ 42 U.S.C. §§ 2021b–2021d (2006).

¹⁶⁷ *Id.* § 2021e(e)(1)(B)(i) (2006). Although the LLW Act delegated the siting process to the states, substantive requirements for site selection, licensing, and regulation continued to be set at the federal level by the Nuclear Regulatory Commission. *See* 10 C.F.R. §§ 61.40–61.44, 61.50 (2010).

¹⁶⁸ 42 U.S.C. § 2021d(a) (repealed 1986) ("After January 1, 1986, any such compact may restrict the use of the regional disposal facilities under the compact to the disposal of low-level radioactive waste generated within the region."); *New York*, 505 U.S. at 151 ("The 1980 Act authorized States to enter into regional compacts that, once ratified by Congress, would have the authority beginning in 1986 to restrict the use of their disposal facilities to waste generated within member States.").

¹⁶⁹ Rabe et al., *supra* note 156, at 78.

¹⁷⁰ *See, e.g.*, Kearney & Stucker, *supra* note 153, at 216.

¹⁷¹ *See New York*, 505 U.S. at 151; William F. Newberry, *The Rise and Fall and Rise and Fall of American Public Policy on Disposal of Low-Level Radioactive Waste*, 3 S.C. ENVTL. L.J. 43, 50 & n.33 (1995) (describing ongoing state resistance).

¹⁷² *New York*, 505 U.S. at 151.

¹⁷³ *Id.*; 131 CONG. REC. 34,809 (1985) (statement of Sen. Bradley (D-N.J.)) ("The failure to achieve the intended result of the 1980 act can be largely attributed to the act's lack of clearly defined incentives and penalties that would induce the establishment of new disposal capacity within the non-sited compact regions."); L. David Condon, *The Never Ending Story: Low-Level Waste and the Exclusionary Authority of Non-Compacting States*, 30 NAT. RE-

gress amended the LLW Act, providing incentives to site additional facilities and imposing penalties on states that failed to do so.¹⁷⁴ The amendments embodied a compromise between the three states with LLW facilities and the rest of the country, whereby the sited states agreed to continue to accept LLW from other states for an additional seven years, and the unsited states agreed to establish alternative disposal facilities in that time.¹⁷⁵

Notably, the LLW Amendments did not preempt state and local laws that prevented the siting of such LLW facilities. Rather,

[f]ederal legislation gave considerable freedom to individual states and compacts in designing their own siting procedures. Once Congress formally approved compacts, local siting authorities devised their own methods of site selection As long as state and compact siting strategies did not violate related federal laws, including the National Environmental Policy Act, states were free to devise any siting strategy.¹⁷⁶

In lieu of preemption, the LLW Amendments provided three types of incentives to pressure states to meet their obligation to dispose of waste generated within their borders.¹⁷⁷ First, the Act provided financial benefits to states that met a series of siting deadlines.¹⁷⁸ Second, the Act imposed increased disposal charges on states that missed the interim deadlines and also restricted their access to existing disposal sites.¹⁷⁹ Third, and most importantly, the LLW Amendments required states that had not provided for disposing of the LLW generated within their borders by 1993 to “take title” to it, thereby assuming liability for any damage it caused.¹⁸⁰

New York chose to comply with the Act by constructing a disposal facility within its own borders.¹⁸¹ Although New York identified five poten-

SOURCES J. 65, 68 (1990) (explaining that the incentives for compelling states to site facilities were insufficient).

¹⁷⁴ Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U.S.C. §§ 2021b–2021j (1985).

¹⁷⁵ *Id.* §§ 2021e(a), (c).

¹⁷⁶ Rabe et al., *supra* note 156, at 81. Thus:

Federal law made the states responsible for disposal of low-level waste, but they did not tell the states how to do the job. Except for the milestone framework in the 1985 law . . . the states essentially were working from a blank slate.

Newberry, *supra* note 171, at 57.

¹⁷⁷ *New York*, 505 U.S. at 152–54.

¹⁷⁸ 42 U.S.C. §§ 2021e(d)–(e) (establishing the interim siting deadlines and financial awards for reaching certain milestones).

¹⁷⁹ *See* 42 U.S.C. § 2021e(e) (imposing escalating surcharges on states that failed to meet interim siting deadlines).

¹⁸⁰ 42 U.S.C. § 2021e(d)(2)(C); *see also* Ryan, *supra* note 17, at 34 (describing the “take-title” provision as “the most severe penalty under the new plan, and that most expected to motivate compliance”).

¹⁸¹ *New York*, 505 U.S. at 154.

tial sites, surrounding residents strongly opposed each choice.¹⁸² In 1990, having failed to make progress in siting a facility, New York challenged the constitutionality of the LLW Amendments.¹⁸³ In *New York v. United States*, the Supreme Court famously invalidated the “take-title” provision as a violation of states’ rights under the Tenth Amendment, but upheld the balance of the statute.¹⁸⁴

In the nearly twenty years since the Supreme Court’s *New York* decision, virtually nothing has been done by the states or Congress to address the low-level radioactive waste disposal problem.¹⁸⁵ Despite early optimism that a state-based approach would more effectively site regional LLW disposal facilities, not a single new facility has been built as part of the regional compacts authorized by the Act.¹⁸⁶

The nation is still served by just three LLW disposal facilities, only one of which will accept LLW generated outside of its regional compact.¹⁸⁷ After reopening and closing several times, Nevada closed the Beatty site permanently in 1992.¹⁸⁸ Since the Beatty site closed, one existing hazardous waste facility in Clive, Utah was licensed to accept the least hazardous type of LLW.¹⁸⁹ The Richland, Washington site remains open, but only accepts waste from states within its regional compact.¹⁹⁰ The Barnwell, South Carolina site continued to accept nationwide waste until July 1, 2008, when it exercised

¹⁸² *Id.*; see also Sam Howe Verhovek, *Nuclear Dump Plan Ignites Rural Protests*, N.Y. TIMES, Sept. 19, 1989, at B1 (describing the locations chosen and local opposition to the sites).

¹⁸³ *New York*, 505 U.S. at 154.

¹⁸⁴ *Id.* at 145.

¹⁸⁵ Ryan, *supra* note 17, at 50–55 (describing the aftermath of *New York* and noting that “[n]either Congress nor the states have meaningfully wrestled with the resulting regulatory ‘hot potato’ since then, each side seeming to conclude from their loss in court that the status quo is really the other’s problem.”).

¹⁸⁶ See *Low-Level Waste Disposal*, *supra* note 18 (“Most states have entered into compacts; however, no new disposal facilities have been built since the Act was passed.”); see also Gerrard, *supra* note 17, at 1082–83 (describing several failed attempts to site LLW facilities following *New York*); Kearney, *supra* note 8, at 63 (describing the “turmoil” in state siting efforts); Mostaghel, *supra* note 158, at 400–02 (describing Michigan’s stalling tactics after being designated a host state by its regional compact).

¹⁸⁷ The facilities are located in Barnwell, South Carolina; Richland, Washington; and Clive, Utah. *Locations of Low-Level Waste Disposal Facilities*, U.S. NUCLEAR REGULATORY COMM’N, <http://www.nrc.gov/waste/llw-disposal/licensing/locations.html> (last updated Mar. 24, 2009). Clive, Utah permits the depositing of waste in its facility, irrespective of its origin. *Id.*

¹⁸⁸ See Richard R. Zuercher, *Nevada Accord Closes Beatty LLW Facility Permanently*, NUCLEONICS WK., Nov. 11, 1993, at 6; see also *Squeeze on Wastes*, CHEMICAL WK., Apr. 12, 1978, at 21 (commenting on the tense relations between Nevada, Washington, and South Carolina over site closures).

¹⁸⁹ GAO LOW-LEVEL WASTE, *supra* note 18, at 31 (providing overview of Clive site); Ledoux & Cade, *supra* note 18, at 3; *Locations of Low-Level Waste Disposal Facilities*, *supra* note 187.

¹⁹⁰ GAO LOW-LEVEL WASTE, *supra* note 18, at 35 (providing an overview of Richland site); Ryan, *supra* note 17, at 53.

its authority under the LLW Act to refuse to accept shipments of waste from outside its regional compact.¹⁹¹

LLW that is not accepted at one of the three existing facilities is stored primarily at the site where it was produced, such as hospitals, research facilities, clinics and nuclear power plants.¹⁹² Particularly since the events of September 11, 2001, the on-site storage of radioactive material—even relatively less hazardous LLW—raises national security concerns.¹⁹³ Thus, the LLW Act's state-based approach to a national siting problem failed to achieve its ultimate goal of ensuring the safe, nationwide disposal of LLW as states, plagued by local opposition, refused to meet their voluntarily assumed compact obligations.

B. Process Preemption: Federal-Local Interaction in Telecommunications Siting

The Supreme Court's decision in *New York v. United States* prompted scholars and policy experts to analyze the failed federal siting efforts.¹⁹⁴ At around that same time, Congress began to consider comprehensive national telecommunications legislation designed to accelerate "private sector deployment of advanced telecommunications and information technologies."¹⁹⁵ Unlike the all-or-nothing approach of the Waste Siting Policies, the TCA's Telecommunications Siting Policy utilizes a mix of regulatory actors to balance national communication goals with legitimate local siting concerns.¹⁹⁶

Prior to the passage of the TCA, telecommunications siting was hindered by inconsistent local permitting requirements¹⁹⁷ and strong local opposition to cell phone towers.¹⁹⁸ To address these obstacles, Congress initially

¹⁹¹ Ryan, *supra* note 17, at 51; *see, e.g.*, Judy Fahys, *Industry Recipe: Diluted N-Waste*, SALT LAKE TRIB., June 28, 2008 (reporting on the closure of Barnwell to all but three other states as of July 2008).

¹⁹² GAO LOW-LEVEL WASTE, *supra* note 18, at 20–21 (describing on-site storage options); *Radioactive Waste, Production, Storage, Disposal*, U.S. NUCLEAR REGULATORY COMM'N, <http://www.nrc.gov/reading-rm/doc-collections/nuregs/brochures/br0216/> (last updated Nov. 3, 2010) (noting that LLW not accepted at one of the three disposal sites is stored on-site).

¹⁹³ GAO LOW-LEVEL WASTE, *supra* note 18, at 21.

¹⁹⁴ *See, e.g.*, Gerrard, *supra* note 17, at 1050; Rabe et al., *supra* note 156, at 80; *see also* Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention?*, 21 FORDHAM URB. L.J. 787, 802–08 (1994); Jeffrey Wagner, *That Was Then and This Is Now: An Economist's Wish List for the LLRW Siting Paradigm*, 38 NAT. RESOURCES J. 635, 635 (1998).

¹⁹⁵ H.R. REP. NO. 104-458, at 113 (1996) (Conf. Rep.).

¹⁹⁶ Salkin & Ostrow, *supra* note 53, at 1088; *see also* Weiser, *supra* note 42, at 1739 (discussing cooperative federalism in the context of the TCA).

¹⁹⁷ *See supra* note 111–112 and accompanying text.

¹⁹⁸ Salkin & Ostrow, *supra* note 53, at 1088 (describing NIMBY opposition to telecommunications towers); *see also* Steven J. Eagle, *Wireless Telecommunications, Infrastructure Security, and the NIMBY Problem*, 54 CATH. U. L. REV. 445, 455–57 (2005) (describing NIMBY opposition to cell tower siting); David W. Hughes, *When NIMBYs Attack: The Heights to Which Communities Will Climb to Prevent the Siting of Wireless Towers*, 23 J. CORP. L. 469, 483 (1998) (noting that NIMBYs bring serious challenges to the industry "[b]ecause the wireless industry must receive permission from local zoning boards to build

considered a proposal that would have granted nearly exclusive siting authority over telecommunications towers to a federal agency.¹⁹⁹ The House "Facilities Siting Policies" called for the Federal Communications Commission ("FCC") to establish a negotiated rulemaking committee to develop substantive policies related to wireless facilities siting considering both the national interest in enhancing coverage and the legitimate interests of state and local governments in regulating the use of land within their own borders.²⁰⁰

In contrast to the House Bill's complete federal preemption of local zoning, the corresponding Senate Bill did not address telecommunications siting at all.²⁰¹ The House-Senate conference committee ultimately adopted a more modest policy that left primary siting responsibility with local authorities, but placed several federal limitations on the siting process.²⁰² According to the conference committee report "The Conference agreement creates a new § 704 which prevents Commission preemption of local and State land use decisions and preserves the authority of State and local governments over zoning and land use matters except in limited circumstances set forth in the conference agreement."²⁰³ Substantively, the Telecommunications Siting Policy advances the federal goal of establishing a nationwide telecommunications infrastructure by preventing localities from "unreasonably discriminat[ing] among providers of functionally equivalent services" and

new towers and antennas"); Martin, *supra* note 125, at 431 ("Local residents' primary concerns have been that proximity to a tower would create health hazards, would be aesthetically unpleasant, and would lower property values.").

¹⁹⁹ See H.R. REP. NO. 104-204, at 25 (1995).

²⁰⁰ In developing such national siting policies, the committee was to consider:

- (i) the desirability of enhancing the coverage and quality of commercial mobile services and fostering competition in the provision of such services; (ii) the legitimate interests of State and local governments in matters of exclusively local concern; (iii) the effect of State and local regulation of facilities siting on interstate commerce; and (iv) the administrative costs to State and local governments of reviewing requests for authorization to locate facilities

Id.

²⁰¹ See generally S. 652, 104th Cong. (1995) (making no mention of telecommunications siting); *Petersburg Cellular P'ship v. Bd. of Sup'rs of Nottoway County*, 205 F.3d 688, 697-98 (4th Cir. 2000) (noting difference between the House version, which would have empowered the FCC to directly regulate the siting of towers, and the Senate version, which would have allowed local zoning officials to retain that authority).

²⁰² H.R. REP. NO. 104-458, at 207-08 (1996) (Conf. Rep.). As others have noted, the distinction between process and substance is sometimes blurred. See *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (including plaintiff's substantive interests as one factor to be weighed in determining the amount of process required to satisfy constitutional due process requirements); Thurman Arnold, *The Role of Substantive Law and Procedure in the Legal Process*, 45 HARV. L. REV. 617, 643 (1932) ("The difference between procedure and substantive law is a movable dividing line which may be placed wherever an objective examination of our judicial institutions indicates is necessary."); Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 900-01, 910-14 (1999) (describing the substance-procedure connection and noting that choice of procedure both reflects substantive values and impacts substantive outcomes).

²⁰³ H.R. REP. NO. 104-458, at 207-08.

from “prohibiting the provision of personal wireless services.”²⁰⁴ The Telecommunications Siting Policy also prohibits the regulation of wireless facilities based on the “environmental effects of radio frequency emissions to the extent that such facilities comply with [FCC] regulations.”²⁰⁵

Procedurally, the Telecommunications Siting Policy requires local governments to respond to any request for authorization to place or construct a cell phone tower “within a reasonable period of time . . . taking into account the nature and scope of such request.”²⁰⁶ It further requires that the local government response “be in writing and supported by substantial evidence contained in a written record.”²⁰⁷ In addition, the Telecommunications Siting Policy creates a judicial right of action, allowing persons aggrieved under the act to take their claims to federal court, and requiring the court to hear and decide the claim on an expedited basis.²⁰⁸

These federal standards preempt conflicting or inconsistent state and local regulations,²⁰⁹ but do not otherwise preempt state regulation of cell tower siting.²¹⁰ Instead, like other cooperative federalist statutes, within the confines of the Telecommunications Siting Policy states remain free to experiment with tower siting and tailor policies to local conditions and preferences.²¹¹ North Carolina, for example, supplements the federal Telecommunications Siting Policy with its own statewide statutory scheme that seeks to curb practices that have prevented wireless coverage expansion in the state.²¹²

Since the passage of the TCA, courts have worked to balance the twin aims of the Telecommunications Siting Policy, weighing the federal interest in deploying a national telecommunications network against the desire to preserve state and local control over land use matters.²¹³ As the First Circuit

²⁰⁴ Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(i)(I)–(II) (2006).

²⁰⁵ *Id.* § 332(c)(7)(B)(iv).

²⁰⁶ *Id.* § 332(c)(7)(B)(ii).

²⁰⁷ *Id.* § 332(c)(7)(B)(iii).

²⁰⁸ *See id.* § 332(c)(7)(B)(v).

²⁰⁹ *See id.* § 332(c)(3)(A); *see also supra* note 6.

²¹⁰ The TCA explicitly states that “[e]xcept as provided in this paragraph, nothing in this Act shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.” 47 U.S.C. § 332(c)(7)(A); *see also* Robert B. Foster & Mitchell A. Carrel, *Patchwork Quilts, Bumblebees, and Scales: Cellular Networks and Land Use Under the Telecommunications Act of 1996*, 36 URB. LAW. 399, 399–400 (2004) (explaining that the TCA “does not completely preempt local zoning authority” but rather places restrictions on local discretion in the context of telecommunications facilities).

²¹¹ Salkin & Ostrow, *supra* note 53, at 1088.

²¹² *See generally* Wireless Telecommunications Facilities Act, 2007 N.C. Sess. Laws 1692 (codified at N.C. GEN. STAT. §§ 160A-400.50–.53 (2007)) (setting time limits within which local government must respond to request to site a cell tower, requiring reasonable permit fees, and limiting review of request to public safety and zoning concerns).

²¹³ *U.S. Cellular Corp. v. City of Wichita Falls*, 364 F.3d 250, 253 (5th Cir. 2004) (observing that the Telecommunications Act balances national and local concerns); *see also* *ATC Realty, LLC v. Town of Kingston*, 303 F.3d 91, 94 (1st Cir. 2002) (describing twin aims of Siting Policy); Foster & Carrel, *supra* note 210, at 399 (same).

observed, “The statute’s balance of local autonomy subject to federal limitations does not offer a single ‘cookie cutter’ solution for diverse local situations Congress conceived that this course would produce . . . individual solutions best adapted to the needs and desires of particular communities.”²¹⁴

In contrast to the Waste Siting Policies, the Telecommunications Siting Policy’s Process Preemption regime has largely succeeded in accomplishing federal land use goals.²¹⁵ In fact, since the Policy was enacted the number of cell towers has dramatically increased, significantly contributing to the rapid deployment of a national telecommunications network.²¹⁶ Given the success of the Telecommunications Siting Policy, the next Part seeks to develop a theory of Process Preemption and assess its potential to inform future federal siting regimes.

V. A THEORY OF PROCESS PREEMPTION

In most industrialized countries the siting of locally undesirable facilities, ranging from prisons to municipal landfills, to group homes for recovering addicts, and especially hazardous and nuclear waste disposal plants, engenders intense public opposition. Such opposition often leads to drawn out permitting processes, extended environmental studies, legal challenges, and in many cases, abandonment of the proposed facility.²¹⁷ Over the past few decades, regulators have experimented with a variety of siting techniques aimed at overcoming local opposition to these land uses, beginning with approaches that focused on technical site screening and selection, moving to strategies that involved negotiating with and compensating host communities, and, most recently, to processes that emphasize voluntary siting.²¹⁸ These innovations have increased public acceptance—and siting success—

²¹⁴ *Town of Amherst v. Omnipoint Commc’ns Enters., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999).

²¹⁵ See *supra* notes 21-22 and accompanying text.

²¹⁶ See *Wireless Quick Facts*, *supra* note 21; FED. COMM’NS COMM’N, FCC 10-81, IMPLEMENTATION OF SECTION 6002(B) OF THE OMNIBUS RECONCILIATION ACT OF 1993: ANNUAL REPORT AND ANALYSIS OF COMPETITIVE MARKET CONDITIONS WITH RESPECT TO MOBILE WIRELESS, INCLUDING COMMERCIAL MOBILE SERVICES 9, 89-100 (2010), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-81A1.pdf (reporting current statistics on wireless usage); Daniel A. Lyons, *Technology Convergence and Federalism: Who Should Decide the Future of Telecommunications Regulation?*, 43 U. MICH. J.L. REFORM 383, 398-402 (2010) (detailing technological advances since the Telecommunications Act).

²¹⁷ Joanne Linnerooth-Bayer, *Fair Siting Strategies for Hazardous Waste Facilities*, in MANAGING CONFLICT IN FACILITY SITING: AN INTERNATIONAL COMPARISON 36 (S.H. Lesbirel and D. Shaw, eds., 2005); Munton, *supra* note 8, at 1, 9-10 (describing national and international NIMBY opposition to wide range of facilities); Rabe et al., *supra* note 156 (comparing the American experience of low-level radioactive waste disposal siting to the Canadian experience); Laurie C. Malkin, Comment, *Troubles at the Doorstep: The Fair Housing Amendments Act of 1988 and Group Homes for Recovering Substance Abusers*, 144 U. PA. L. REV. 759 (1995) (describing public response to siting group homes for recovering substance abusers).

²¹⁸ Roger E. Kasperson, *Siting Hazardous Facilities: Searching for Effective Institutions and Processes*, in MANAGING CONFLICT IN FACILITY SITING, *supra* note 217, at 13, 20-23 (describing voluntary siting techniques); Munton, *supra* note 8, at 10-23 (summarizing progression of siting strategies including “Decide, Announce, Defend,” preemption, public partic-

for certain facilities, such as solid waste treatment plants and prisons, but have failed to increase successful siting of more controversial hazardous and radioactive waste facilities.²¹⁹

Given its incredibly complex nature, with political, social, economic and legal dimensions, a full analysis of the factors that impact siting success is beyond the scope of this Article.²²⁰ Moreover, this Article does not propose a generic siting strategy suitable for all federal regulatory programs. Instead, this Article identifies two innovations of the Telecommunications Siting Policy's Process Preemption regime relative to prior federal siting regimes and evaluates the potential for Process Preemption to aid in future federal land use policies, including those involving hazardous waste facilities.

In particular, this Part argues that Process Preemption has the potential to contribute to a national siting program by (a) accounting for the interjurisdictional nature of a federal land use policy and (b) imposing procedural constraints on the local land use decisionmaking process.

Section A argues that one failure of the Waste Siting Policies was its binary, dual federalist approach to waste facilities siting, which empowered the federal government to site high-level waste facilities and state governments to site low-level waste facilities. In contrast, Process Preemption accounts for the interjurisdictional dynamic by involving both federal and local regulators in the siting scheme.²²¹

Section B argues that the procedural constraints imposed by Process Preemption, including the requirement that decisions be made within a reasonable period of time, supported by substantial evidence contained in a written record and subject to expedited federal judicial review, facilitate national land use goals by increasing the consistency and transparency of the local decision-making process and allowing for more effective judicial review of zoning decisions.

Section C recognizes the limitations of Process Preemption as well as its potential to further national land use priorities. Specifically, Process Pre-

ipation, negotiation and compensation, and the voluntary-choice process); Tarlock, *supra* note 155, at 613–14 (describing evolution of siting strategies).

²¹⁹ Linnerooth-Bayer, *supra* note 217, at 36; *see also* Been, *supra* note 194, at 800–08 (detailing unsuccessful efforts to implement compensated siting for low-level radioactive waste).

²²⁰ *See, e.g.*, Linnerooth-Bayer, *supra* note 217, at 36 (listing elements common to successful siting regimes, including: (1) widespread agreement that the facility is needed to address a long-term problem; (2) that the facility must not impose unacceptable health and safety risks; (3) that the community must be involved in the siting process; and (4) that the siting process and outcome must be perceived as fair); Munton, *supra* note 8, at 2–3 (explaining that NIMBY opposition to siting stems from a combination of factors including the problems of providing public goods, local perception that facility siting process is undemocratic, concerns over health and safety, and concerns about fairness and equity).

²²¹ *Town of Amherst v. Omnipoint Commc'ns Enters., Inc.*, 173 F.3d 9, 17 (1st Cir. 1999) (describing the Telecommunications Siting Policy as a “refreshing experiment in federalism” and stating that “[t]he statute’s balance of local autonomy subject to federal limitations” enables solutions tailored for diverse local situations).

emption seems well suited to facilitate nationwide siting of renewable energy facilities, such as wind turbines and solar installations.²²² In addition, although Process Preemption is unlikely to overcome entrenched local opposition to siting centralized radioactive waste disposal facilities, it could play a role in a reformulated national strategy emphasizing local storage of radioactive waste.

A. *An Interjurisdictional Approach*

A number of federal statutes that implicate local land use policies seem to have recognized the crucial role that federal-local interaction plays in successful implementation of the federal scheme.²²³ For example, the Coastal Zone Management Act of 1972 ("CZMA"),²²⁴ enacted in response to growing concern regarding pollution of the nation's coastline,²²⁵ establishes a federal policy that requires states to work with local governments to manage the state coastline.²²⁶ In particular, the CZMA requires states to create "an effective mechanism for continuing consultation and coordination" between a designated state management agency and local governments within the coastal zone "to assure the full participation of those local governments and agencies" in implementing the Act.²²⁷ In addition, if the management agency administering the state program makes a decision that conflicts with local

²²² Recently, several scholars have advocated for increased federal regulation of renewable energy siting to promote national renewable energy goals; Process Preemption provides a model through which to channel federal intervention. *See, e.g.*, Bronin, *supra* note 24, at 550 (arguing that to overcome state and local obstacles, Congress should require states to consider model standards for alternative energy microgrids); Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 EMORY L.J. (forthcoming Mar.-Apr. 2011) (arguing for the adoption of a federal regulatory floor for the construction and physical location of distributed renewable devices, such as wind turbines and rooftop solar panels); Salkin & Ostrow, *supra* note 53, at 1091-97 (arguing for the enactment of a federal wind siting policy).

²²³ The Disaster Mitigation Act of 2000 emphasizes the need for interjurisdictional coordination between federal, state, and local governments to establish and implement a national program for pre-disaster mitigation and administration of disaster relief. 42 U.S.C. § 5121(b) (2006); *see also* FED. EMERGENCY MGMT. AGENCY, MULTI-HAZARD MITIGATION PLANNING GUIDANCE UNDER THE DISASTER MITIGATION ACT OF 2000 v (2004), available at <http://www.fema.gov/library/viewRecord.do?id=3115>. The Clean Air Act, 42 U.S.C. § 7410 (2006), and the Transportation Equity Act for the 21st Century, 23 U.S.C. §§ 110-166 (2006), similarly take local governments and local planning efforts into account. *See* Buzbee, *supra* note 28, at 93-94.

²²⁴ 16 U.S.C. §§ 1451-1465 (2006).

²²⁵ SALKIN, *supra* note 28, § 3:3 ("The Act was a response to a growing concern that the nation's coasts were becoming polluted due to the 'piecemeal development of coastal ecosystems without an overall strategy for comprehensive coastal management.'") (citing 118 CONG. REC. 14,170-71 (1972) (statement of Sen. Hollings(D-S.C.))).

²²⁶ 16 U.S.C. § 1455(d)(1). *See also*, SALKIN, *supra* note 28, § 3.3 ("The drafters of CZMA recognized that for the Act to be successful, it needed to be implemented at the local level, given that significant land use controls are adopted and administered by municipalities.").

²²⁷ 16 U.S.C. § 1455(d)(1).

law, the agency must send notice to the local government and allow a 30-day comment period.²²⁸

In contrast, the federal Waste Siting Policies' dual federalism approach fundamentally misses the interjurisdictional nature of the radioactive waste-siting problem. The NWPA assumed that siting a high-level hazardous waste facility was purely a federal matter, and therefore adopted an aggressively preemptive approach that entirely excluded participation by state and local regulators.²²⁹ In contrast, the LLW Act adopted the view endorsed by the National Governors' Association, treating LLW management primarily as a land use issue, within the realm of traditional state authority.²³⁰

In reality, of course, radioactive waste siting implicates land use law, a fundamental local concern, as well as a variety of federal concerns, including energy production, national security, and interstate commerce.²³¹ Federal siting regimes thus present a classic interjurisdictional regulatory problem that cannot be effectively remedied by a regulatory regime that exclusively empowers one level of government. Neither the federal government nor the state governments acting alone have the capacity to implement federal siting policies.²³²

As the Yucca Mountain debacle demonstrates, notwithstanding the federal government's formal *legal* authority to preempt local zoning regulations, the federal government cannot simply preempt local political authority and force an unwanted facility on a resistant community.²³³ In his testimony before the Blue Ribbon Commission on Nuclear Energy, John Gervers, a consultant to the Clark County Nuclear Waste Division, noted that "the key lesson to be learned from the Nevada experience is that public acceptance of a siting process is an essential ingredient for success of any nuclear waste storage or disposal system."²³⁴ Indeed, siting conflicts throughout the country and internationally confirm that unilateral preemption of the siting pro-

²²⁸ *Id.* § 1455(d)(3)(B).

²²⁹ See *supra* notes 136–143.

²³⁰ Kearney, *supra* note 8, at 60; Rabe et al., *supra* note 156, at 78; see also *supra* notes 163–166 (noting that adoption of LLW Act recognized LLW siting as primarily a matter of state and local concern).

²³¹ See *supra* notes 130–134 (describing federal interest in radioactive waste management).

²³² Engel, *supra* note 73, at 159 (arguing that the static allocation of regulatory authority to either the state or federal government obstructs good environmental management, and that broadly overlapping state and federal regulatory jurisdiction is needed); Ryan, *supra* note 7, at 573 (noting that *de jure* interjurisdictional problems arise when neither side has all of the jurisdiction needed to effectively solve the problem).

²³³ See *supra* Part IV.A.1.

²³⁴ John Gervers, Consultant, Clark Cnty. Nev. Nuclear Waste Div., A Local Government Perspective on Intergovernmental Relations at the Yucca Mountain Project, Testimony before the Blue Ribbon Commission on America's Nuclear Future (July 7, 2010), http://brc.gov/Disposal_SC/docs/ClarkCountyTestimony7-7-10.pdf.

cess almost always fails²³⁵ and may even increase opposition to future siting efforts.²³⁶ As Michael Gerrard wrote in the early 1990s:

One clear lesson of the past two decades is that adamant, sustained citizen opposition, when backed by local government, almost always wins Most importantly, it shows that the widespread practice of trying to preempt local control and force disposal facilities on unwilling communities is much like the medieval practice of bleeding the sick: it is exquisitely counterproductive. Not only does it never work, it actually increases opposition exponentially by turning what might be a voluntary risk into an involuntary, highly intrusive risk.²³⁷

Instead, to gain local cooperation, the local community must be involved in the siting process, and local residents must feel that their concerns have been addressed.²³⁸

At the same time, siting regimes that exclusively empower the states, and by extension local governments, to site (or refuse to site) waste facilities similarly lack the jurisdictional mechanisms needed to be effective. As Part II explains, "local" land use creates a paradox. On the one hand, "local" land use is desirable, as a theoretical matter, and necessary, as a functional matter, because locally elected officials are in the best position to assess local development needs and respond to local community concerns.²³⁹ Yet, as the NIMBY phenomenon vividly demonstrates, local land use decisions have effects that extend far beyond municipal borders. In the absence of countervailing federal or state policy there is no mechanism through which to compel local decisionmakers to consider regional or federal interests in the decisionmaking process.²⁴⁰ As a result, locally elected officials are generally unwilling to force undesirable land uses on hostile communities, even in the face of recognized national or regional need.²⁴¹

In contrast, Process Preemption accounts for the interjurisdictional nature of federal siting regimes. The Telecommunications Siting Policy establishes a regulatory framework that leaves primary siting authority in the hands of local regulators, but places explicit substantive and procedural con-

²³⁵ Bingham & Miller, *supra* note 8, at 477 (explaining that "[s]imply preempting local controls . . . is unlikely to resolve the siting dilemma because it does not address the causes of opposition"); Munton, *supra* note 8, at 12 (noting that states can strip local officials of permitting power, but not political power to oppose siting decisions).

²³⁶ Gerrard, *supra* note 17, at 1152.

²³⁷ *Id.* at 1137, 1152.

²³⁸ *Id.* at 1153–64; Gervers, *supra* note 234, at 2 (noting that "failure to acknowledge community concerns can lead to political resistance and public demonstrations"); Linnerooth-Bayer, *supra* note 217, at 36 (emphasizing importance of community involvement); Munton, *supra* note 8, at 2 (noting that NIMBY opposition arises, in part, because the community feels excluded from the democratic process).

²³⁹ See *supra* notes 40–46 and accompanying text.

²⁴⁰ See *supra* notes 49–58 and accompanying text.

²⁴¹ See Fischel, *supra* note 52, at 881, 884–85; Kearney, *supra* note 8, at 63.

straints on the decision-making process. The substantive constraints, which preempt local ordinances that “unreasonably discriminate among providers of functionally equivalent services,”²⁴² “prohibit the provision of personal wireless services,”²⁴³ or vary from FCC regulations governing radio frequency emissions,²⁴⁴ promote national interests by establishing baseline standards for telecommunications siting decisions. The procedural constraints, discussed more fully in the next Section, create an express mechanism through which to effectuate the substantive policy goals.

Process Preemption thus creates an antidote to the political process failure that sets in when local communities are exclusively empowered to regulate land use.²⁴⁵ By imposing federal constraints on the local zoning process, Process Preemption creates a legal mechanism that forces local officials to look beyond their own borders and consider national priorities in local land use decisions. At the same time, like the CZMA and other cooperative regimes, the Telecommunications Siting Policy is sensitive to local preferences and permits local governments to tailor the implementation of the policy to local geographical, social, and economic conditions.²⁴⁶

B. *The Promise of Process*

In addition to its interjurisdictional approach, a second crucial innovation of the Telecommunications Siting Policy, relative to other siting regimes, is its emphasis on local procedural safeguards. The Standard State Zoning Enabling Act²⁴⁷ adopted by most states in the early part of the 20th century failed to establish uniform local procedures for administering zoning regulations.²⁴⁸ As a result, procedural protections in the zoning process vary widely across jurisdictions. For example, though most jurisdictions require that some form of notice be given to impacted landowners,²⁴⁹ the form of

²⁴² Telecommunications Act of 1996, 47 U.S.C. § 332(c)(7)(B)(i)(I)–(II) (2006).

²⁴³ *Id.*

²⁴⁴ *Id.* § 332(c)(7)(B)(iv).

²⁴⁵ Nolon, *supra* note 55, at 16.

²⁴⁶ In addition, others have noted that the Telecommunications Siting Policy’s interjurisdictional approach encourages cooperation, rather than hostility, between land use developers and zoning officials. According to John Nagle:

The combination of local authority constrained by federal law has encouraged municipal zoning officials to identify those places in their community where cell phone towers would produce the least aesthetic harms, rather than trying to ban such towers altogether The TCA also encourages cellular providers to research the propriety of possible sites for a new cell phone tower rather than simply choosing a site and then trying to force local officials to approve it.

Nagle, *supra* note 22, at 564.

²⁴⁷ ADVISORY COMM. ON ZONING, *supra* note 35.

²⁴⁸ Edward Sullivan, *The Time for State and Local Governments to Consider the ABA Model Legislation for Land Use Procedures Is Now!*, ADMIN. & REG. L. NEWS, Feb. 12-13, 2009, at 11.

²⁴⁹ SALKIN, *supra* note 28, § 40:1 (summarizing notice requirements); 8 PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 51.04 (Mar. 2007) (explaining that state enabling

notice required ranges from public notice in the form of a newspaper advertisement or posting on the property to mailed notice within a specified radius of the affected property.²⁵⁰

Moreover, board hearings may be so informal as to cast doubt on the legitimacy of the proceedings; witnesses are rarely subpoenaed and frequently are not placed under oath; cross-examination is uncommon; and the rules of evidence do not apply.²⁵¹ Edward Sullivan, who led an American Bar Association task force charged with developing fair procedures for the enactment and administration of land use regulations, criticized the local decisionmaking process for leaving applicants “in the midst of multiple layered hearings, facing inadequate procedures before local boards and commissions that were not always competent to handle decision making in a discretionary environment.”²⁵²

Indeed, commentators concerned about the apparent ad hoc, discretionary nature of local land use decisionmaking have often argued for procedural reforms as one way to check local discretion.²⁵³ In 2008 the American Bar Association task force responded by promulgating a Model Statute on Local Land Use Processes (“ABA Model Code”) intended to establish uniform and fair procedures for land use decision-making.²⁵⁴

The Telecommunications Siting Policy similarly imposes procedural safeguards by requiring that siting decisions be (1) made within a reasonable period of time; (2) supported by substantial evidence contained in a written record; and (3) subject to expedited federal judicial review.²⁵⁵ The overall impact of these procedural constraints is to increase the transparency and consistency of the local siting process and facilitate judicial review of individual siting decisions. Moreover, procedural protections can enhance the

acts and municipal ordinances generally provide that notice of an administrative zoning hearing must be given to all parties and anyone else who might otherwise be interested in the subject proceedings).

²⁵⁰ SALKIN, *supra* note 28, § 40:1.

²⁵¹ *Id.*; Daniel R. Mandelker, *Model Legislation For Land Use Decisions*, 35 URB. LAW. 635, 639 (2003) (describing decision-making under the SZEA as “chaotic” and noting that “[h]earings are undisciplined with no real attempt at a fair process that includes necessary procedural safeguards.”).

²⁵² Edward J. Sullivan, *Chair’s Message*, 30 ST. & LOC. L. NEWS, Spring 2007, at 2, 14.

²⁵³ Mark Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D. L. REV. 161, 169 (1989) (“Recognizing the entrenchment of zoning flexibility and to some degree ad hoc decisionmaking, commentators have argued that more attention needs to be paid to the manner and process by which such decisions are made.”); Mandelker, *supra* note 251, at 636 n.5 (arguing for reform “to provide a decision making process in which administrative relief is routine and final decisions are required within a reasonable time.”) (internal citation omitted); Ostrow, *supra* note 29, at 717, 734-37 (recommending heightened standard of judicial review); Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 Harv. Negot. L. Rev. 337, 339 (2002) (recommending increased representation of concerned parties to counteract the “deal-like” nature of decisionmaking).

²⁵⁴ MODEL STATUTE ON LOCAL LAND USE PROCESSES (2008) [hereinafter ABA MODEL CODE], available at http://new.abanet.org/sections/statelocal/PublicDocuments/report_to_the_house_of_delegates.pdf.

²⁵⁵ 47 U.S.C. § 332(c)(7)(B).

public's perception of fairness in the decisionmaking process, increasing public acceptance of the ultimate result.²⁵⁶

1. Decisions Within a Reasonable Time

Zoning boards confronted with controversial or unpopular proposals often have an incentive to postpone making a decision either in the hopes that substantial delay will increase costs for the developer and encourage abandonment of the project,²⁵⁷ or in order to extract concessions from the developer.²⁵⁸ As others have noted, long delays in the zoning process call the motives of regulators into question and undermine the legitimacy of the final decision.²⁵⁹

Accordingly, the recently adopted ABA Model Code sets time limits within which land use decisions must be made and requires the zoning board to refund application fees if these deadlines are missed.²⁶⁰ The comments explain:

[I]t is one of the fundamental elements of due process that a decision maker must come to a final decision within a reasonable period of time. Certainty is one of the goals of the land-use decisionmaking process . . . and a failure by a local government to decide either way on a development permit application destroys certainty.²⁶¹

²⁵⁶ See Jessica Mantel, *Procedural Safeguards for Agency Guidance: A Source of Legitimacy for the Administrative State*, 61 ADMIN. L. REV. 343, 377–79 (2009) (citing studies that “found that individuals’ judgments about the fairness of the government’s decision-making process, rather than the decisions themselves, dominate how individuals generalize from their own experience to their overarching views on the legitimacy of government authorities”); Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1278 (2009) (noting that “reason-giving fosters democratic legitimacy because it both embodies, and provides the preconditions for, a deliberative democracy that seeks to achieve consensus on ways of promoting the public good”).

²⁵⁷ ABA MODEL CODE, *supra* note 254, § 210 (noting that in the absence of monetary consequence “a dilatory local government would have a strong incentive to do nothing with a controversial permit application”); see also *Snyder-Westerlind Corp. v. Mayor of Atl. Highlands*, 341 A.2d 687, 689 (N.J. Super. Ct. App. Div. 1975) (observing that municipal officials may fail to act in order to discourage an applicant or because “an application presents a politically unpopular atmosphere”); *Humble Oil & Ref. Co. v. Borough of E. Lansdowne*, 227 A.2d 664, 666 (Pa. 1967) (noting that “a Board could effectively prevent the erection of needed structures through the simple process of luxurious lolling while spiders of inattention spin webs of indifference over pending public problems”).

²⁵⁸ Cordes, *supra* note 253, at 167 (noting that “delayed and flexible decision-making also provides municipalities with significant leverage over potential development in order to obtain developer concessions”).

²⁵⁹ Eagle, *supra* note 198, at 493.

²⁶⁰ ABA MODEL CODE, *supra* note 254, § 210.

²⁶¹ *Id.* § 210 cmt.

A number of jurisdictions similarly require that zoning decisions be made within a reasonable period of time.²⁶² Such limitations are designed to expedite the board's decision and to provide the applicant with speedy notice of the status of his application.²⁶³

The Telecommunications Siting Policy requires local governments to act on telecommunications siting requests within a reasonable time "taking into account the nature and scope of such request."²⁶⁴ The legislative history indicates that in requiring that zoning decisions be made within a "reasonable" time, Congress did not intend "to give preferential treatment to the personal wireless service industry in the processing of requests, or to subject their requests to any but the generally applicable time frames for zoning decision [sic]."²⁶⁵

Still, the reasonableness requirement prevents zoning boards from stalling by providing a basis for applicants to challenge indefinite, unjustified permitting delays. Courts have held that local authorities failed to act within a reasonable period of time when they have unnecessarily kept applicants "tied up in the hearing process through invocation of state procedures, moratoria, or gimmicks."²⁶⁶ At the same time, requiring decisions within a "reasonable" time does not compel local authorities to forgo a thorough investigation of the proposed application.²⁶⁷ Instead, Congress chose a relatively flexible "reasonable" time requirement to allow local authorities to consider the particular merits of each application.²⁶⁸

²⁶² See, e.g., CONN. GEN. STAT. ANN. § 8-7d(a) (West, Westlaw through 2010 Feb. Reg. Sess., June Sp. Sess., and July Sp. Sess.); KAN. STAT. ANN. § 12-752(b) (West, Westlaw through 2010 Reg. Sess.); 53 PA. STAT. ANN. § 10508 (West, Westlaw through 2010 Reg. Sess. and First Sp. Sess.); see also SALKIN, *supra* note 28, § 40:47 (providing a general overview of the laws governing delays in zoning board decisions).

²⁶³ See Miles v. Foley, 752 A.2d 503, 508 (Conn. 2000); see also Carolyn W. Poulin, Comment, *Land Use Applications Not Acted Upon Shall Be Deemed Approved: A Weighing of the Interests*, 57 UMKC L. REV. 607, 614 (1989) (discussing the purposes of deemed approval statutes).

²⁶⁴ 47 U.S.C. § 332(c)(7)(B)(ii) (2006).

²⁶⁵ H.R. REP. NO. 104-458, at 208 (1996) (Conf. Rep.); see also N.Y. SMSA Ltd. P'ship v. Riverhead Town Bd., 118 F. Supp. 2d 333, 341 (E.D.N.Y. 2000), *aff'd*, 45 F. App'x 24 (2d Cir. 2002) (finding that the term "reasonable" was used to allow zoning boards flexibility in the amount of time they have to consider each application given the nature of the request).

²⁶⁶ Masterpage Commc'ns, Inc. v. Town of Olive, N.Y., 418 F. Supp. 2d 66, 77 (N.D.N.Y. 2005) (internal citations omitted); see also USCOC of Greater Missouri, LLC v. City of Ferguson, Mo., No. 4:07-CV-1489(JCH), 2007 WL 4218978, at *5 (E.D. Mo. Nov. 29, 2007) (internal citations omitted) (warning that local authorities should not transform the application process into a "self-perpetuating, endless odyssey").

²⁶⁷ See, e.g., N.Y. SMSA Ltd. P'ship v. Town of Riverhead, 45 F. App'x 24, 27 (2d Cir. 2002) (explaining that the "reasonable time" requirement includes time required to comply with state environmental review); Sprint Spectrum, L.P. v. City of Medina, 924 F. Supp. 1036, 1040 (W.D. Wash. 1996) (indicating that a moratorium on siting is permitted if required to evaluate applications and gather information).

²⁶⁸ N.Y. SMSA Ltd. P'ship, 118 F. Supp. 2d at 341 (finding that "the term 'reasonable' was no doubt used to allow local authorities the flexibility to consider each application on its individual merit" and that "what is reasonable will necessarily depend upon the nature and scope of each request.").

Of course, Congress could have assured even more timely decision-making by including an express time limit, for example a requirement that denials of telecommunications siting permits be made within 60 or 180 days. Establishing an explicit time frame at the outset of the regulatory policy, however, would have risked locking in a suboptimal regulatory choice.²⁶⁹ Instead, the relatively flexible “reasonable” time limit allowed the FCC and local decisionmakers to gain practical experience and expertise in siting telecommunications facilities without fear of a ticking clock.

On the basis of this experience, in November 2009, after more than a decade administering the Telecommunications Siting Policy and reviewing siting decisions, the FCC issued a declaratory ruling to provide guidance on the time frame that would be considered “reasonable” under the statute.²⁷⁰ Under the FCC ruling, zoning boards must respond to requests for co-location within ninety days and requests for new tower construction within 150 days.²⁷¹ According to the FCC, the ruling “achieves a balance by defining reasonable and achievable timeframes for State and local governments to act on zoning applications while not dictating any substantive outcome on any particular case or otherwise limiting State and local governments’ fundamental authority over local land use.”²⁷² The FCC’s significant practical experience administering the Telecommunications Siting Policy under a flexible reasonable time standard increases the likelihood that its ultimate ruling fairly balances national telecommunications priorities and local siting concerns.²⁷³

2. *Decisions Supported by Substantial Evidence Contained in a Written Record*

a. *Written Record*

Given the informal nature of proceedings before a zoning board, it is not surprising that boards often fail to create adequate records of zoning

²⁶⁹ See *supra* notes 96–98 and accompanying text.

²⁷⁰ Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B), 24 F.C.C.R. 13,994, 14,010 (Nov. 18, 2009) [hereinafter *Declaratory Ruling*]; see also Robert B. Foster, *The Better Part of Valor Is Co-Location: Recent Developments in Judicial Review of Land Use Regulation of Cellular Telecommunications Facilities Under the Telecommunications Act of 1996*, 42 URB. LAW. 595, 601 (2010) (noting that “the FCC set these deadlines based on the actual practice it saw in the record, with evidence that co-location applications require less time than standalone tower applications”).

²⁷¹ Declaratory Ruling, *supra* note 270, at 14,010. Failure to make a ruling within these time periods creates a rebuttable presumption of unreasonableness. *Id.*

²⁷² Press Release, FCC Issues Declaratory Ruling Establishing Timeframes for State and Locality Processing of Applications for Wireless Towers 1 (Nov. 18, 2009), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-294711A1.pdf; see also Declaratory Ruling, *supra* note 270, at 14,032 (Statement of Comm’r Robert M. McDowell) (“Our ruling strikes an elegant balance between establishing a deregulatory national framework to clear unnecessary underbrush, while preserving state and local control over tower siting.”).

²⁷³ Foster, *supra* note 270, at 602; Weiser, *supra* note 42, at 1702–03.

hearings.²⁷⁴ Zoning determinations frequently lack clear findings of fact and fail to explain the basis upon which the decision was made.²⁷⁵ As a result, a reviewing court may not have the information necessary to serve as a meaningful check on local discretion.²⁷⁶

Recognizing the problem created by inadequate record keeping and ambiguous decision-making, the ABA Model Code requires that decisions on land use permits be based upon and accompanied by a written statement containing, among other things: (1) the facts relied upon in making the decision; (2) the regulations relevant to the decision; (3) responses to all related issues raised by the parties during the hearing; and (4) any other conditions that must be satisfied before a certificate of compliance can be issued.²⁷⁷ The Telecommunications Siting Policy similarly addresses this procedural shortcoming by requiring that denials of telecommunications siting applications be in writing and supported by substantial evidence contained in a written record.²⁷⁸

The effect of both the ABA Model Code and the Telecommunications Siting Policy's writing requirements is to increase the transparency of the zoning process. Transparency allows concerned parties, including developers, surrounding property owners, public officials and members of the community to understand governmental decisions, to detect improper motives, and to hold decisionmakers accountable.²⁷⁹ A publicly available record of zoning decisions imposes a check on the zoning process by allowing applicants and, significantly, courts to compare the results of similar applications to detect inconsistent or arbitrary results. Thus, a writing requirement and looming threat of constituent and judicial review create an incentive for zoning boards to exercise principled discretion. In addition, requiring zoning boards to support their decisions in writing likely promotes more deliberative and rational decisionmaking, leading to better substantive results.²⁸⁰

²⁷⁴ SALKIN, *supra* note 28, § 40:1 (noting that in many zoning hearings records are indifferently kept).

²⁷⁵ *Id.* ("[T]he decision itself may be so deficient in findings and so ambiguous as to its rationale, that a reviewing court may have difficulty in determining what was decided and on what basis.").

²⁷⁶ *See id.* § 40:44 ("If the court's power to correct clear abuses of discretion is to be effectively exercised, the findings must disclose the facts upon which the board's determination rests.").

²⁷⁷ ABA MODEL CODE, *supra* note 254, at § 204(4); *see also id.* § 204(4) cmt. ("To avoid confusion about what has been decided, a reasoned decision based on findings of fact is an essential conclusion to the permit review process.").

²⁷⁸ 47 U.S.C. § 332(c)(7)(B)(ii)–(iii) (2006).

²⁷⁹ *See* Bressman, *supra* note 98, at 506; Staszewski, *supra* note 256, at 1278–84 (arguing that public officials in a democracy can be held accountable by a requirement or expectation that they give reasoned explanations for their decisions).

²⁸⁰ *See* Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 9 (1972) ("[T]he giving of reasons helps the decision-maker himself in the effort to be fair and rational, and makes it possible for others to judge whether he has succeeded."); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657–58 (1995) (noting that "the very time required to give reasons may reduce excess haste and thus produce better decisions" and that a "reason-giving mandate will also drive out illegitimate reasons when they are the only plausible expla-

Though the TCA's writing requirement imposes a procedural safeguard on the zoning process, its failure to set out in more detail what must be contained in the writing has led to much litigation.²⁸¹ For example, the Sixth Circuit, adopting a standard first enunciated by the First Circuit,²⁸² has held that "a governmental unit's decision must (1) be separate from the written record, (2) describe the reasons for the denial, and (3) contain a sufficient explanation of the reasons for the denial to allow a reviewing court to evaluate the evidence in the record that supports those reasons."²⁸³ In contrast, other courts accept less extensive writings, including the minutes of the meeting at which the decision was made or a letter conveying the decision.²⁸⁴

As with the reasonableness requirement described above, however, the relatively vague writing requirement contained in the original statute has allowed regulators time to gain experience siting telecommunications facilities and courts time to gain experience reviewing these decisions. At this point, it may be appropriate for the FCC or Congress to issue guidance on the writing requirement. In particular, if the goal of the writing requirement is to increase the transparency and ultimate acceptability of siting decisions as well as to facilitate judicial review, then the more fulsome standards of the Sixth Circuit's interpretation of the TCA's writing requirement or the ABA Model Code's standard should be adopted. Nevertheless, the very fact of imposing a writing requirement adds a vital procedural check on telecommunications siting decisions, helping to insert the federal interest into the local decisionmaking process.

b. Substantial Evidence

In addition to the writing requirement, the Telecommunications Siting Policy creates a judicial check on the local zoning process by requiring telecommunications decisions to be supported by a higher degree of evidence than is traditionally required to uphold local zoning decisions. Judicial re-

nation for particular outcomes"); Staszewski, *supra* note 256, at 1294–1303 (explaining that the reasoned-decisionmaking requirement in the administrative law context is intended to ensure deliberative and public-focused decisionmaking, in part by forewarning agencies that the failure to articulate the basis for a policy decision will result in judicial remand to the agency); cf. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1695 (1984) (arguing that government behavior becomes constrained if the government is forced to justify its conduct on the basis of some public value).

²⁸¹ See, e.g., Eagle, *supra* note 198, at 467–68 (describing litigation over writing requirement); Martin, *supra* note 125, at 433–35 (same).

²⁸² Sw. Bell Mobile Sys., Inc. v. Todd, 244 F.3d 51, 60 (1st Cir. 2001).

²⁸³ New Par v. City of Saginaw, 301 F.3d 390, 395–96 (6th Cir. 2002); see also, MetroPCS, Inc. v. City & Cnty. of San Francisco, 400 F.3d 715, 723 (9th Cir. 2005).

²⁸⁴ See, e.g., AT&T Wireless PCS, Inc. v. Winston-Salem Zoning Bd. of Adjustment, 172 F.3d 307, 312–13 (4th Cir. 1999) (secretary writing "denied" on application suffices); Bell-South Mobility, Inc. v. Parish of Plaquemines, 40 F. Supp. 2d 372, 377–78 (E.D. La. 1999) (letter and documentary record enough; TCA does not require written reasons); PrimeCo Pers. Comm'n, L.P. v. Fox Lake, 26 F. Supp. 2d 1052, 1062 (N.D. Ill. 1998) (trustee minutes satisfied the writing requirement).

view of local land use decisions is notoriously deferential.²⁸⁵ In its landmark decision of *Village of Euclid v. Ambler Realty Co.*, the Supreme Court held that a zoning ordinance violates due process only if it is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."²⁸⁶ State courts generally accord local zoning decisions a presumption of validity and refuse to overturn them unless they are arbitrary, capricious, or unreasonable.²⁸⁷ Federal courts apply an even more deferential "shocks the conscience" standard to local administrative acts.²⁸⁸

In contrast, the Telecommunications Siting Policy requires that all decisions to deny a wireless service facility's siting request be "supported by substantial evidence contained in a written record."²⁸⁹ Although the term "substantial evidence" is not defined in the statute, Congress indicated that courts should employ "the traditional standard used for judicial review of agency actions."²⁹⁰ Generally, courts have interpreted this standard to require "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."²⁹¹

The "substantial evidence" standard is less deferential to local decision-makers than the traditional standards of judicial review in land use cases. In *Cellular Telephone Co. v. Town of Oyster Bay*, the Second Circuit explained the impact of the substantial evidence requirement as follows:

²⁸⁵ SALKIN, *supra* note 28, § 15:3; Ostrow, *supra* note 29, at 729–30 (describing deferential standard of review); Charles L. Siemon & Julie P. Kendig, *Judicial Review of Local Government Decisions: "Midnight in the Garden of Good and Evil"*, 20 NOVA L. REV. 707, 712–15 (1996) (criticizing deferential review).

²⁸⁶ 272 U.S. 365, 395 (1926).

²⁸⁷ See, e.g., *City of Lilburn v. Sanchez*, 491 S.E.2d 353, 355 (Ga. 1997) (holding that under the rational basis test "any plausible or arguable reason that supports an ordinance will satisfy substantive due process"); *Bradley v. Payson City Corp.*, 70 P.3d 47, 50 (Utah 2003) (stating that zoning amendment decisions are upheld unless "arbitrary and capricious or otherwise illegal"); *Prete v. City of Morgantown*, 456 S.E.2d 498, 500 (W. Va. 1995) (upholding zoning ordinances so long as not arbitrary and capricious). Even Planning Commission decisions that are not affirmed by the local legislative body are accorded legislative deference. See, e.g., *Harris v. Zoning Comm'n of New Milford*, 788 A.2d 1239, 1251 (Conn. 2002) (upholding zoning commission decisions unless they are "clearly contrary to law" or there was an "abuse of discretion"); *Markland v. Jasper Cnty. Planning & Dev. Dep't.*, 829 N.E.2d 92, 96 (Ind. Ct. App. 2005) (same); *Auger v. Town of Strafford*, 931 A.2d 1213, 1216 (N.H. 2007) (applying deferential reasonableness standard for review of planning board decisions).

²⁸⁸ See, e.g., *Natale v. Town of Ridgefield*, 170 F.3d 258, 262–63 (2d Cir. 1999); *Anderson v. Douglas County*, 4 F.3d 574, 577 (8th Cir. 1993) (using a "truly irrational" standard).

²⁸⁹ 47 U.S.C. § 332(c)(7)(B)(iii) (2006).

²⁹⁰ H.R. REP. NO. 104-458, at 208 (1996) (Conf. Rep.).

²⁹¹ *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 494 (2d Cir. 1999); see also *Preferred Sites, LLC v. Troup Cnty.*, 296 F.3d 1210, 1218 (11th Cir. 2002); *Sw. Bell Mobile Sys., Inc. v. Todd*, 244 F.3d 51, 58 (1st Cir. 2001); *Telespectrum, Inc. v. Pub. Serv. Comm'n of Ky.*, 227 F.3d 414, 423 (6th Cir. 2000); *Omnipoint Corp. v. Zoning Hearing Bd. of Pine Grove Twp.*, 181 F.3d 403, 408 (3d Cir. 1999). In contrast, the Fourth Circuit has adopted a "reasonable legislator" standard that gives great weight to public opinion in evaluating whether a permit denial is supported by "substantial evidence." *AT&T Wireless PCS, Inc. v. City Council of Va. Beach*, 155 F.3d 423, 430 (4th Cir. 1998).

Traditionally, the federal courts have taken an extremely deferential stance in reviewing local zoning decisions, limiting the scope of inquiry to the constitutionality of the zoning decision under a standard of rational review. Although Congress explicitly preserved local zoning authority in all other respects over the siting of wireless facilities, the method by which siting decisions are made is now subject to judicial oversight. Therefore, *denials subject to the TCA are reviewed by this court more closely than standard local zoning decisions.*²⁹²

Though the substantial evidence standard is less deferential than the arbitrary and capricious standard of review, it does not substitute local judgments with those of the judiciary.²⁹³ Instead, the substantial evidence standard is keyed to the localities' own zoning code.²⁹⁴ The Telecommunications Siting Policy sets out the degree of evidence needed to support the zoning decision, but the decision itself is to be made in compliance with substantive state and local law.²⁹⁵

In *T-Mobile Central, LLC v. Unified Gov't of Wyandotte County/Kansas*, for example, the city denied T-Mobile's siting request in part because T-Mobile failed to demonstrate that a denial would prohibit the provision of wireless service.²⁹⁶ Both parties agreed that T-Mobile met the minimum criteria set out in the zoning code, which included set-back requirements and landscaping requirements, among other things, but did not require applicants to demonstrate that a denial would prohibit the provision of wireless service.²⁹⁷ The Tenth Circuit held that the city did not base its decision on sub-

²⁹² *Cellular Tel. Co. (Oyster Bay)*, 166 F.3d at 493 (emphasis added) (citations omitted); see also *Preferred Sites, LLC*, 296 F.3d at 1218 (finding that "substantial evidence" standard "requires courts to take a harder look than when reviewing under the arbitrary and capricious standard"); *BellSouth Mobility, Inc. v. Parish of Plaquemines*, 40 F. Supp. 2d 372, 377 (E.D. La. 1999) (noting that "substantial evidence" standard of review is more strict than usual "arbitrary and capricious" standard).

²⁹³ *T-Mobile Cent., LLC v. Unified Gov't of Wyandotte Cnty/Kansas City*, 546 F.3d 1299, 1307 (10th Cir. 2008) (internal citations omitted) ("While a reviewing court has no power to substitute its own conclusions for those of the fact-finder . . . if the record as a whole contains conflicting evidence, the fact-finder must adequately explain its reasons for rejecting or discrediting competent evidence . . .").

²⁹⁴ *USCOC of Greater Mo. v. City of Ferguson*, 583 F.3d 1035, 1042 (8th Cir. 2009); *T-Mobile Cent., LLC*, 546 F.3d at 1307; *U.S. Cellular Tel., LLC v. City of Broken Arrow*, 340 F.3d 1122, 1133 (10th Cir. 2003); *New Par v. City of Saginaw*, 301 F.3d 390, 398 (6th Cir. 2002); *Town of Amherst v. Omnipoint Commc'n Enters.*, 173 F.3d 9, 14 (1st Cir. 1999).

²⁹⁵ *Eagle*, *supra* note 198, at 477 (noting that "federal law specifies the degree or quantum of evidence needed to legitimize, under federal law, the exercise of legislative powers devolved upon local boards, under state law, to enforce substantive rights established by state law"); see also *Martin*, *supra* note 125, at 433–34 (citing cases holding that substantial evidence must be based on existing state and local law).

²⁹⁶ 546 F.3d at 1307–08.

²⁹⁷ *Id.* at 1303 n.2, 1307–08.

stantial evidence because the city "invent[ed] a criterion" not required by the local zoning ordinance.²⁹⁸

Critics of the substantial evidence standard worry that it will privilege formal fact finding and prevent boards from properly considering local opinions and concerns over aesthetics and property values, which are not easily reducible to empirical data.²⁹⁹ However, courts have generally taken a more practical approach, upholding permit denials based on aesthetic concerns even when not supported by declines in market value, so long as the objections are tied to the particular tower and not to cell phone towers generally or a misunderstanding of what the tower would actually look like.³⁰⁰ For example, the Eleventh Circuit has held that although "citizens' generalized concerns about aesthetics are insufficient to constitute substantial evidence . . . [a]esthetic concerns may be a valid basis for denial of a permit *if* substantial evidence of the visual impact of [a] tower" is presented.³⁰¹ Thus, the TCA's substantial evidence requirement imposes a heightened judicial check on local siting decisions while deferring to substantive state and local zoning regulations.

3. Federal Judicial Review

The federal judiciary has long resisted hearing land use cases, imposing numerous procedural barriers to block access to the federal courts.³⁰² As a result, land use disputes are typically heard in state court. The Telecommunications Siting Policy creates a federal judicial right of action, allowing persons aggrieved under the Act to take their claims to federal court and requiring the court to hear and decide the claim on an "expedited basis."³⁰³ In so doing, the TCA provides a federal forum for land use cases involving telecommunications siting, signaling the national implications of telecommunications siting decisions.

²⁹⁸ *Id.* at 1307–08.

²⁹⁹ Christopher P. Terry, *On the Frontiers of Knowledge: A Flexible Substantial Evidence Standard of Review for Zoning Board Tower Siting Decisions*, 20 TEMP. ENVTL. L. & TECH. J. 147, 156 (2002).

³⁰⁰ Eagle, *supra* note 198, at 478–79; *see also T-Mobile Cent., LLC*, 546 F.3d at 1312 (holding that "[m]ere generalized concerns regarding aesthetics are insufficient to constitute the substantial evidence justifying the denial of an application to construct a wireless telecommunications facility").

³⁰¹ *Preferred Sites, LLC v. Troup County*, 296 F.3d 1210, 1219 (11th Cir. 2002).

³⁰² STEVEN H. STEINGLASS, 1 SECTION 1983 LITIGATION IN STATE COURTS § 6:16 (2010) (noting that "federal courts are often reluctant to hear zoning and other land use cases and have relied on abstention, preclusion, and their discretion to refuse to exercise pendent jurisdiction to limit access to federal court in § 1983 land use cases" (citations omitted)); Gregory Overstreet, *The Ripeness Doctrine of the Taking Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91, 92 (1994) (demonstrating that the procedural ripeness doctrine effectively excludes land use cases from federal court); Fischel, *supra* note 28, § 5 (noting that the Supreme Court has imposed numerous procedural barriers to access to the federal courts).

³⁰³ 47 U.S.C. § 332(c)(7)(B)(v). The ABA Model Code similarly requires expedited judicial review of land use decisions. ABA MODEL CODE, *supra* note 254, § 610.

Moreover, in contrast to federal judges who are appointed, and—once confirmed by the Senate—enjoy life tenure, most state judges are elected by the local population and serve for terms, rather than for life.³⁰⁴ Some studies have concluded that elected judges are more sensitive to local pressures and public opinion than federal judges.³⁰⁵ Particularly in the context of NIMBY disputes, federal judges, who are presumably insulated from local politics, may be able to approach siting conflicts from a more national perspective.

C. The Future of Federal Process Preemption

With its emphasis on procedural safeguards and its innovative interjurisdictional approach, Process Preemption has the potential to facilitate siting a variety of nationally significant land uses, including renewable energy structures and small-scale radioactive waste storage facilities.

1. Renewable Energy Siting

A majority of states have already adopted mandatory Renewable Portfolio Standards that require increasing percentages of electricity sold by utilities within each state to be produced from renewable sources, including wind.³⁰⁶ Congress has also been considering the adoption of a federal RPS that would require electric utilities to produce increasing percentages of their electricity from renewable sources, reaching approximately twenty-five percent by 2025.³⁰⁷

Wind power, in particular, receives overwhelming public support in national surveys.³⁰⁸ Advocates note that the advantages of wind energy include: “(a) environmental benefits, such as reduced greenhouse gas emissions; (b)

³⁰⁴ RICHARD BRIFFAULT & LAURIE REYNOLDS, *STATE AND LOCAL GOVERNMENT LAW* 53 (West 6th ed. 2004); David E. Posen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 266 (2008) (noting that “the majority of U.S. states have subjected at least some of their courts to popular elections; roughly ninety percent of state general jurisdiction judges are currently selected or retained this way”); James Sample, *Court Reform Enters the Post-Caperton Era*, 58 DRAKE L. REV. 787, 791 (2010) (noting “thirty-nine states in which judges face election”).

³⁰⁵ Posen, *supra* note 304, at 271 (“Elected judges are less independent than appointed judges in the sense that the public can vote them out of office if it does not like their decisions.”); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157, 186 (1999) (finding that elected judges are more likely to redistribute wealth from out-of-state businesses to in-state plaintiffs).

³⁰⁶ For an updated map showing states with RPS, see PEW CENTER ON GLOBAL CLIMATE CHANGE, RENEWABLE & ALTERNATIVE ENERGY AND PORTFOLIO STANDARDS, (2009), available at <http://www.pewclimate.org/sites/default/modules/usmap/pdf.php?file=5907>.

³⁰⁷ Davies, *supra* note 94, at 1341 (noting that over twenty-five proposals for a national RPS have been introduced in the federal legislature); Salkin & Ostrow, *supra* note 53, at 1051 (describing federal RPS proposals). See generally Joshua P. Fershee, *Moving Power Forward: Creating A Forward-Looking Energy Policy Based on a National RPS*, 42 CONN. L. REV. 1405 (2010) (discussing the benefits of implementing a national RPS, while indicating that supplemental energy legislation, including federal siting authority for transmission lines, is necessary to ensure that the goals of a national RPS will be achieved).

³⁰⁸ Salkin & Ostrow, *supra* note 53, at 1063–64 (citing polls).

economic benefits, including price stability, job creation, and new sources of income for rural communities; and (c) national security benefits, achieved by reducing national reliance on foreign oil.”³⁰⁹

Despite national support, wind energy projects often face intense opposition at the local level.³¹⁰ Indeed, the reaction of local communities has prompted one prominent energy siting consultant to remark that “wind energy is fast becoming ‘the mother of all NIMBY wars.’”³¹¹ In contrast to hazardous waste facilities, however, local objections to wind turbine siting revolve less around unacceptable health and safety concerns, and more around standard development considerations, including concerns over aesthetic impacts; noise; negative impacts on property values, tourism, and recreational opportunities; negative environmental impacts caused by turbine construction; and negative impacts on birds, bats, and other wildlife.³¹²

A Process Preemption regime that is part of an overall federal renewable energy policy could greatly facilitate wind energy siting. As with telecommunications siting, a federal wind siting policy, or more broadly, renewable energy siting policy, would compel local governments to consider the extra-local impacts of their siting decisions without depriving local officials of their traditional land use regulatory authority.³¹³ Moreover, Process Preemption would increase regulatory uniformity, facilitating the development of nation-wide renewable energy infrastructure, without unduly compromising the ability of local officials to respond to local conditions.³¹⁴

³⁰⁹ *Id.*, at 1055–56.

³¹⁰ Martin, *supra* note 125, at 428–39; *see also* Mark Clayton, *America's Future Wind Web?*, CHRISTIAN SCI. MONITOR, Feb. 19, 2009, at 25 (describing local opposition to transmission lines); Robert D. Kahn, *Siting Struggles: The Unique Challenge of Permitting Renewable Energy Power Plants*, ELECTRICITY J., Mar. 2000, at 21, 26 (describing NIMBY opposition to the Kenetech Windpower project in the early 1990s, where residents from over thirty miles away complained about “visual pollution”); Op-Ed., *Wind Power, Rhetoric*, ALBANY TIMES-UNION, Oct. 8, 2008, at A10 (describing NIMBY opposition to wind energy project in upstate New York).

³¹¹ Marty Durlin, Op-Ed., *Wind Farms—Not in My Backyard*, RUIDOSO NEWS (N.M.), Mar. 19, 2009, at A4 (statement of Bob Kahn, head of Strategic Communications, a Seattle-based firm that helps wind farms gain siting permits).

³¹² Martin, *supra* note 125, at 441–50 (describing local objections to wind siting); Salkin & Ostrow, *supra* note 53, at 1071–76 (assessing local concerns regarding wind turbine siting).

³¹³ *See generally* Salkin & Ostrow, *supra* note 53 (proposing federal wind siting policy modeled on the Telecommunications Siting Policy).

³¹⁴ Inconsistent local land use requirements increase the costs, and reduce the feasibility, of some renewable energy projects. *See* Bronin, *supra* note 24, at 571–72; Salkin & Ostrow, *supra* note 53, at 1086–87; *see also*, U.S. DEP'T OF ENERGY, 20% WIND ENERGY BY 2030: INCREASING WIND ENERGY'S CONTRIBUTION TO U.S. ELECTRICITY SUPPLY 119 (2008) (finding that “[i]ncreased uniformity of regulatory requirements across regions would greatly facilitate the increased deployment of wind projects necessary to reach [federal renewable energy goals]”).

2. Radioactive Waste Disposal Facilities

Although Process Preemption has succeeded in siting telecommunications facilities, this Article does not contend that Process Preemption alone would succeed in overcoming local opposition to siting waste disposal facilities. Critically, while cell phone towers raise significant health concerns,³¹⁵ they do not generate the same fear and loathing as do hazardous waste facilities.³¹⁶ According to Don Munton:

Hazardous waste facilities evoke extreme dread. Although cause and effect is impossible to pinpoint with scientific certainty, community residents suspect high rates of illness, rare cancers, miscarriages, birth defects, and deformities in live stock are caused by hazardous waste incinerator emissions or releases of toxic chemicals that migrate through the soil and contaminate nearby surface waters and groundwater aquifers.³¹⁷

Case studies suggest that it is difficult to overcome local opposition to facilities that are perceived to be unacceptably hazardous, as is the case with radioactive waste sites.³¹⁸ In these cases, increased safety measures are unlikely to be viewed as making the facility safe enough.³¹⁹ Moreover, offers of compensation at best have no effect, and may even have a negative effect on local acceptance of radioactive waste facilities.³²⁰ If residents believe a facil-

³¹⁵ See, e.g., Carrie Hyman & Marcia Zina Mager, *Children, Cell Phones, and Health: An Inconvenient Truth About A Convenient Technology*, ORGANIC LIFESTYLE MAG., Oct. 2009, at 18, available at <http://www.organiclifestylemagazine.com/issue-9/children-cell-phones-health.php> (noting that there are more than 2,000 independent studies linking electromagnetic fields with serious health issues, such as Alzheimer's and Parkinson's disease, Autism, Attention Deficit Disorder and a variety of cancers); Taraka Serrano, *Cell Phone Towers: How Far Is Safe?*, EMF-HEALTH.COM (2007), <http://www.emf-health.com/articles-celltower.htm> (describing two studies that concluded that living near a cell phone tower could have a negative impact on health). The American Cancer Society, however, has summarized findings on health impacts of cell phone towers and concludes that they are unlikely to cause cancer. *Cellular Phone Towers*, AMERICAN CANCER SOCIETY, <http://www.cancer.org/Cancer/CancerCauses/Other-Carcinogens/AtHome/cellular-phone-towers?sitearea=PED> (last updated June 25, 2010).

³¹⁶ Kearney, *supra* note 8, at 63; see Eileen Gauna, *LNG Facility Siting and Environmental (In)justice: Is it Time for a National Siting Scheme?*, 2 ENVTL. & ENERGY L. & POL'Y J. 85, 89 (2007); Gerrard, *supra* note 17, at 1137-38.

³¹⁷ Munton, *supra* note 8, at 1.

³¹⁸ Linnerooth-Bayer, *supra* note 217, at 36 (concluding that it is difficult to gain community approval for siting facilities that evoke perceptions of high risk); see also Lawrence S. Bacow & James R. Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265, 267-69 (1982) (describing the generally intense local opposition to hazardous waste facilities).

³¹⁹ Linnerooth-Bayer, *supra* note 217, at 36.

³²⁰ Hank C. Jenkins-Smith & Howard Kunreuther, *Mitigation and Benefits Measures as Policy Tools for Siting Potentially Hazardous Facilities: Determinants of Effectiveness and Appropriateness*, in MANAGING CONFLICT IN FACILITY SITING: AN INTERNATIONAL COMPARISON, *supra* note 217, at 63; Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law* 102 MICH. L. REV. 71, 87-89 (2003) (noting intense opposition from "those who believe that societal benefits and burdens in general, and the burdens associated with the facility in question in particular, are being distributed inequitably"); Peñalver, *supra* note 44, at

ity is unacceptably hazardous, they will view compensation as a bribe and will oppose the facility no matter how great the compensation.³²¹ Unless the public believes that radioactive waste can be safely disposed of, finding acceptable sites for radioactive waste facilities will continue to prove quite difficult, regardless of the federal constraints imposed on the siting process.

At the same time, a number of recent events—including the DOE's renewed interest in nuclear power, the closure of the Barnwell, South Carolina disposal facility to nationwide waste, the abandonment of the Yucca Mountain site, and the international concern regarding the ongoing nuclear crisis in Japan—create an urgent need for new solutions.

While some experts continue to search for more effective siting strategies in the context of radioactive waste,³²² others have argued that the inability to site radioactive waste facilities should serve as a powerful incentive to reevaluate the technology and consider alternatives.³²³ Still others advocate abandoning the search for a centralized nuclear repository and adopting a strategy that utilizes above-ground dry container storage facilities dispersed throughout the country.³²⁴ The recently established Blue Ribbon Commission on America's Nuclear Future is charged with studying each of these possibilities, as well as with recommending legislation to aid in accomplishing federal goals.³²⁵

Thus, the current siting stalemate could change if the national policy regarding radioactive waste disposal shifted from searching for large, centralized disposal facilities to smaller, more easily located, local storage facilities.³²⁶ In fact, local storage is the *de facto* method of radioactive waste

845–46 (surveying literature on compensation and concluding that compensation will have little effect where facilities are opposed on grounds other than concern regarding property values).

³²¹ MICHAEL GERRARD, *WHOSE BACKYARD, WHOSE RISK* 126 (1994); Jenkins-Smith & Kunreuther, *supra* note 320, at 65; Munton, *supra* note 8, at 17. In contrast to radioactive waste facilities, empirical studies have demonstrated that compensation and other forms of community benefits are likely to increase the percentage of the local community willing to support other undesirable land uses, including prisons and land-fills. Jenkins-Smith & Kunreuther, *supra* note 320, at 63–65 (citing studies).

³²² See, e.g., Daigee Shaw, *Visions of the Future for Facilities Siting*, in *MANAGING CONFLICTS IN FACILITY SITING: AN INTERNATIONAL COMPARISON*, *supra* note 217, at 196; Jenkins-Smith & Kunreuther, *supra* note 320, at 63; Kasperon, *supra* note 218, at 13.

³²³ See, e.g., Michael Thompson, *Unsiteability: What Should It Tell Us?*, 7 *RISK* 169 (1996). In particular, Thompson advocates temporary above-ground storage as a way to solve short-term problems while giving policymakers time to develop a long-term solution. *Id.*

³²⁴ Indeed, the NRC has determined that these dry cask storage systems can safely store nuclear waste for at least thirty years beyond a reactor's life. GAO NUCLEAR WASTE, *supra* note 12, at 10; see also *Nuclear Wasteland*, *supra* note 144.

³²⁵ BLUE RIBBON COMM'N ON AMERICA'S NUCLEAR FUTURE, *supra* note 150; see also GAO NUCLEAR WASTE, *supra* note 12, at 22–29 (assessing the Yucca Mountain repository and proposing two alternative options, including centralized storage at two locations or continued on-site storage of nuclear waste); see also GAO LOW-LEVEL WASTE, *supra* note 18, at 40–43 (evaluating alternative strategies for managing LLW).

³²⁶ See GAO NUCLEAR WASTE, *supra* note 12, at 10 (describing potential for above-ground storage of waste); Munton, *supra* note 8, at 8–9 (describing trend away from permanent, large-scale plants to smaller, mobile units and alternative disposal technologies).

management in this country, as all high-level radioactive waste, and much low-level radioactive waste, is stored at the facility where it was produced.³²⁷ Though the NRC policy favors disposal over storage, the NRC allows indefinite on-site storage of LLW.³²⁸

In contrast to centralized waste disposal facilities, small storage facilities, which potentially can be sited in any number of locations throughout a jurisdiction, are perhaps amenable to a Process Preemption regime. The success of Process Preemption in telecommunications siting, and its potential for success in wind energy siting, is likely due, in part, to the fact that cell phone towers and wind turbines are physically smaller and less obtrusive than waste disposal facilities.³²⁹ Thus, local decisionmakers often have a real choice in deciding among the possible locations for a cell phone tower. On the other hand, within any jurisdiction there are likely to be only one or two viable locations for a large waste disposal facility, leaving unhappy regulators with even fewer siting choices.

Furthermore, any potential host community is likely to feel unfairly burdened in housing a large waste disposal facility designed to serve a much broader region.³³⁰ In fact, the few states with LLW disposal facilities have expressed anger and frustration at being forced to accept a disproportionate share of the nation's waste.³³¹ In contrast, cell phone towers are widely dispersed throughout the country,³³² distributing the burden of telecommunications siting more equitably among jurisdictions. Moreover, as the number of cell phone users has exploded over the last decade,³³³ most citizens recognize the value of increasing the number of cell phone towers.³³⁴ The burden of

³²⁷ GAO NUCLEAR WASTE, *supra* note 12, at 36–40 (noting that all nuclear waste is currently stored on-site); GAO LOW-LEVEL WASTE, *supra* note 18, at 20–21 (noting that low-level waste that is not accepted by one of the commercial disposal sites is stored on-site).

³²⁸ GAO LOW-LEVEL WASTE, *supra* note 18, at 21.

³²⁹ For example, the LLW facility in Barnwell, South Carolina, is located on a 235 acre tract of land. *Barnwell Facility*, ENERGY SOLUTIONS, <http://www.energysolutions.com/customer-portal/barnwell-facility> (last visited Mar. 5, 2011). In contrast, cellular phone towers are usually mounted on top or on the side of existing structures, such as trees, water tanks, or tall buildings. See *Cellular Phone Towers*, *supra* note 315.

³³⁰ Kahan, *supra* note 320, at 87–89 (describing negative impact of compensation on siting efforts); Munton, *supra* note 8, at 3 (noting that concerns regarding distributional equity often underlie siting disputes).

³³¹ See *supra* notes 157–163 and accompanying text.

³³² Wireless providers must site an increasing number of cell towers in order to meet the consumer demand for personal communication systems. See Hughes, *supra* note 198, at 481. For a map depicting cell phone tower sites by state, see *Cell Tower Location Maps Index*, CELLTOWERINFO.COM <http://www.celltowerinfo.com/CellTowerLocationMapsIndex.htm> (last visited Mar. 5, 2011).

³³³ FCC, TRENDS IN TELEPHONE SERVICE 11-4, chart 11.1 (2008), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-284932A1.pdf (describing growth of wireless industry).

³³⁴ See, e.g., Jack Encarnacao, *Good Reception: Cell-Tower OK Looks Probable*, PATRIOT LEDGER, Aug. 18, 2005, at 13 (describing “a watershed change in attitudes about the necessity of cell towers” that has led to reduced public opposition to cell tower siting); Derrick Henry, *Mixed Signals on Cellphone Towers*, N.Y. TIMES, Jan. 11, 2009, at CT1 (noting that “[c]ellphone towers have proliferated throughout New York City’s suburbs in recent years,

siting a cell phone tower is, therefore, balanced by the tangible benefits of increasing the quality and availability of local cell phone service.

Similarly, local storage facilities would more evenly distribute the burden of waste management across the country, rather than concentrating the costs of waste disposal on one or two host communities. In addition, it is possible that local communities would be more willing to accept the burden of *locally* produced wastes because, as with cell phone towers, they benefit from the activities that produced the waste³³⁵ in the form of higher paying jobs and sophisticated medical care at hospitals using radioactive medicine.³³⁶

In this context, a federal Process Preemption framework would empower local officials to site small storage facilities, subject to national substantive and procedural constraints on the siting process. Substantive constraints might include preemption of local ordinances that ban such facilities from within the jurisdiction or that regulate the health and safety standards of such facilities, to the extent that the facilities comply with national standards set by the NRC.

Procedural constraints might require that local decisions be made within a reasonable period of time and be supported by substantial evidence contained in a written record and subject to expedited judicial review. In this way, Process Preemption could balance federal and local interests in radioactive waste facilities siting, furthering the national goal of safely disposing of radioactive waste without alienating local officials and generating insurmountable community opposition.

VI. CONCLUSION

Federal preemption of state autonomy is often controversial. It is even more so when federal preemption impacts land use, an area long deemed to be within the purview of local governments. This Article has examined three federal siting regimes, two relating to the siting of radioactive waste facilities and one concerning the siting of telecommunication towers, to illustrate the range of regulatory options available to Congress in crafting federal policy.

often welcomed by municipalities and by residents who would benefit from the tens or hundreds of thousands of dollars a year that go into public coffers"); Leilani Albano, *Los Angeles Residents Fight Back Against AT&T Cell Phone Tower*, L.A. WEEKLY BLOGS (Oct. 12, 2010, 6:10 PM), http://blogs.lawweekly.com/informer/2010/10/los_angeles_residents_fight_ba.php (noting that AT&T collected signatures from residents who supported the cell tower siting).

³³⁵ Kahan, *supra* note 320, at 88.

³³⁶ BARRY G. RABE, BEYOND NIMBY: HAZARDOUS WASTE SITING IN CANADA AND THE UNITED STATES 43 (1994) (higher paying jobs); *id.* at 142 (describing on-site storage of waste produced at medical facilities); Susan L. Satter, Note, *Congressional Recognition of State Authority over Nuclear Power and Waste Disposal*, 58 CHI.-KENT L. REV. 813, 833 (1982) (detailing medical treatments that produce LLW).

Though express federal preemption of local land use authority might appear, at first glance, to be the most effective method of siting nationally relevant facilities, such federal preemption has largely failed to accomplish federal goals. Experience convincingly demonstrates that sustained local opposition to a proposed land use is difficult to overcome through formal preemption of local authority. In addition, aggressive federal preemption is at odds with modern theories of cooperative federalism, which rely on multiple layers of government to achieve federal policy goals.

Complete federal delegation of siting authority to states, which in turn empower local governments to exercise this authority, has similarly failed to achieve federal siting goals. Regimes that exclusively empower local decisionmakers flounder because locally elected officials tend to focus exclusively on the well being of their own residents to the detriment of outsiders. In the absence of countervailing federal or state policy, there is no mechanism through which to compel local decisionmakers to consider regional or federal interests in their decisionmaking process.

In contrast to a regime that places siting authority entirely within one level of government, Process Preemption is an interjurisdictional approach that places *federal* substantive and procedural constraints on the *local* siting process. This Article demonstrates that Process Preemption's innovative use of federal and local regulators, combined with its emphasis on procedural safeguards, effectively balances national and local land use priorities, and increases the legitimacy and public acceptance of controversial siting decisions.

